Supreme Court, U.S.
FILED

952058 JUN 19 1996

OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

CHRYSLER CORPORATION,

Petitioner,

v.

THE UNITED STATES,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITION FOR A WRIT OF CERTIORARI

ROBERT E. BURKE
(Counsel of Record)
DONALD J. UNGER
LAWRENCE M. FRIEDMAN
BARNES, RICHARDSON & COLBURN
200 East Randolph Drive
Suite 7920
Chicago, Illinois 60601
(312) 565-2000

Attorneys for Petitioner

Midwest Law Printing Co., Chicago 60610, (312) 321-0220

75pp

QUESTION PRESENTED FOR REVIEW

Is a United States importer of motor vehicles entitled to a customs duty exemption for United States-origin body components (such as hoods, trunk lids, doors, roofs, etc.) that are assembled in Mexico into finished vehicles and are painted during the assembly process under tariff subheading 9802.00.80 which permits an exemption for such components when used in "assembly . . . and . . . [subjected to] operations incidental to the assembly process . . . such as . . . painting"?

PARTIES TO THE PROCEEDING BELOW

The parties to the proceedings in the United States Court of International Trade and the United States Court of Appeals for the Federal Circuit were: Chrysler Corporation and the United States. Chrysler Corporation has no parent company; its nonwholly owned subsidiaries are listed below:

Chrysler de Mexico, S.A.
Eurostar Gesellschaft m.b.H.
Chrysler Europe S.A.
Chrysler Sales and Services (Thailand)
New Venture Gear, Inc.
Dollar Rent A Car Systems, Ltd. (New Zealand)
Thrifty Europe, S.A.
TRAC Asia Pacific, Inc.
Chrysler Commercial S.A. de C.V.

Chrysler is also majority owner, directly or indirectly, of 37 retail outlets in the United States and 17 retail outlets outside the United States

TABLE OF CONTENTS

	PAGE
QUESTION PRESENTED FOR REVIEW	i
PARTIES TO THE PROCEEDING BELOW	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	2
STATUTORY PROVISIONS INVOLVED	2
Statutes	2
Regulations	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	5
I. The Federal Circuit's Decision Conflicts with Established Principles of Statutory Construction	7
A. Neither Legislative History Nor Policy Considerations Overcome the Clear Statutory Language	7
B. The Federal Circuit's Interpretation of HTSUS Subheading 9802 Renders Some of Its Words Redundant	8
C. The Federal Circuit did not Read 9802 *In Pari Materia* with Similar Language in the Tariff Schedule	10
D. The Federal Circuit's Reading of 9802 Produces Absurd Results and Cannot be Fairly Administered	11

II. The Federal Circuit Ignored the Plain Language of the Applicable Customs Regulation Permitting Preservative Painting 13

III. Review by the Supreme Court is Necessary to Eliminate Uncertainty and Avoid Repetitive Litigation 15

CONCLUSION 18

APPENDIX TABLE OF CONTENTS

APP. PAGE

Chrysler Corporation v. United States, No. 95-1366, 1996 U.S. App. Lexis 6368 (Fed. Cir. Mar. 22, 1996) 1

Chrysler Corporation v. United States, 20 CIT ____, Slip Op. 95-39 (Ct. Int'l Trade Mar. 13, 1995) 7

General Motors Corp. v. United States, 976 F.2d 716 (Fed. Cir. 1992) 15

General Motors Corp. v. United States, 15 CIT 372, 770 F. Supp. 641 (1991) 26

TABLE OF AUTHORITIES

CASES:	PAGE
Atlantic Cleaners & Dryers, Inc. v. United States, 286 U.S. 427 (1932)	10
Barr v. United States, 324 U.S. 83 (1945)	5, 15
Caminetti v. United States, 242 U.S. 470 (1917)	7
Chrysler Corp. v. Brown, 441 U.S. 281 (1979)	13
Chrysler Corporation v. United States, 20 CIT ____, slip op. 95-39 (Ct. Int'l Trade Mar. 13, 1995)	4, 12, 13, 17
Chrysler Corporation v. United States, No. 95-1366, 1996 U.S. App. Lexis 6368 (Fed. Cir. Mar. 22, 1996)	*passim*
Connecticut Nat'l Bank v. Germain, 503 U.S. 249 (1992)	7
Digital Equipment Corp. v. United States, 889 F.2d 267 (Fed. Cir. 1989)	4
ETSI Pipeline Project v. Missouri, 484 U.S. 495 (1988)	7
Fort Stewart School v. Federal Labor Relations Auth., 495 U.S. 641 (1990)	13
Gardebring v. Jenkins, 485 U.S. 415 (1988)	6
Gardner v. Brown, 5 F.3d 1456 (Fed. Cir. 1993)	8
General Motors Corp. v. United States, 15 CIT 372, 770 F. Supp. 641 (1991)	16
General Motors Corp. v. United States, 976 F.2d 716 (Fed. Cir. 1992)	*passim*
Gustafson v. Alloyd Co., 115 S. Ct. 1061 (1995)	5, 8, 9
Haggar Co. v. Helvering, 308 U.S. 389 (1940)	5, 11

Helvering v. Stockholms Enskilda Bank, 293 U.S. 84 (1934) 10

Hemschmeidt Corp. v. United States, 72 F.3d 868 (Fed. Cir. 1995) 14

Marcel Watch Co. v. United States, 11 F.3d 1054 (Fed. Cir. 1993) 4

Mullins Coal Co. v. Director, OWCP, 484 U.S. 135 (1987) 14

Northern Indiana Pub. Serv. Co. v. Porter County Chapter of Izaak Walton League of Am., Inc., 423 U.S. 12 (1975) 14

Thomas Jefferson Univ. v. Shalala, 129 L.Ed.2d 405 (1994) 6

United States v. Bush & Co., 310 U.S. 371 (1940) . 5, 15

United States v. Mast Indus., Inc., 668 F.2d 501 (CCPA 1981) 4, 9

United States v. Nixon, 418 U.S. 683 (1974) ... 13

United States v. Ron Pair Ent., 489 U.S. 235 (1989) 7

United States v. Turkette, 452 U.S. 576 (1981) ... 5

STATUTES:

19 U.S.C. § 1202, *Harmonized Tariff Schedule of the United States*, Section XX, Chapter 95, Note 1(p) 10

19 U.S.C. § 1202, *Harmonized Tariff Schedule of the United States*, subheading 9802.00.80 ... 2, 3, 8

19 U.S.C. § 1514(a)(2) 15

28 U.S.C. § 1254(1) 2

28 U.S.C. § 1295(a)(5) 4, 16

28 U.S.C. § 1581(a) 16

REGULATIONS:

19 C.F.R. § 10.16(b) 2, 3, 6, 13, 18, 19

OTHER:

H.R. Rep. No. 342, 89th Cong., 1st Sess. (1965) . 14

Production Sharing: Use of U.S. Components and Materials in Foreign Assembly Operations, 1990-1993, U.S. Int'l Trade Comm. Pub. 2886, 1993 Annual Report Investigation No. 332-237 (1995) 15

S. Rep. No. 530, 89th Cong., 1st Sess., *reprinted in*, 1965 U.S. Code Cong. & Admin. News 3416 9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

CHRYSLER CORPORATION,

Petitioner,

v.

THE UNITED STATES,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITION FOR A WRIT OF CERTIORARI

Chrysler Corporation hereby petitions this Court for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Federal Circuit.

OPINIONS BELOW

The decision of the Court of Appeals for the Federal Circuit of March 22, 1996 is unpublished. It is available on Lexis at 1996 U.S. App. Lexis 6368 and is printed in the Appendix (hereinafter "App."), *infra*, 1. The opinion and judgment of the United States Court of International Trade is to be reported at 20 CIT ___ (1996). The trial court opinion has not been published in the *Federal Supplement* but is available at 1996 Ct. Intl. Trade Lexis 66 and is printed in the Appendix, *infra*, at 6.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The judgment of the Federal Circuit is dated and was entered on March 22, 1996.

STATUTORY PROVISIONS INVOLVED

Statutes

19 U.S.C. § 1202, *Harmonized Tariff Schedule of the United States* subheading 9802.00.80 (U.S. Int'l Trade Comm. Pub. No. 2937) provides in relevant part:

> Articles . . . assembled abroad in whole or in part of fabricated components, the product of the United States, which . . . have not been advanced in value or improved in condition except by operations incidental to the assembly process such as cleaning, lubricating and painting . . .[are subject to a] duty upon the full value of the imported article, less the cost or value of such products of the United States . . . .

Regulations

19 C.F.R. § 10.16(b) provides in relevant part:

> Operations incidental to the assembly process whether performed before, during, or after assembly, do not constitute further fabrication, and shall not preclude the application of the exemption. The following are examples of operations which are incidental to the assembly process:
>
> . . .
>
> (3) Application of preservative paint or coating, including preservative metallic coating, lubricants, or protective encapsulation. . . .

STATEMENT OF THE CASE

The question before the Court is whether tariff subheading 9802.00.80 ("9802") of the *Harmonized Tariff Schedule of the United States* ("HTSUS") and 19 C.F.R. § 10.16(b) require the United States Customs Service ("Customs") to grant a partial customs duty exemption for painted United States-origin components used in the foreign assembly of imported merchandise. This a question of first impression in this Court and is an important question of federal law that has not been but should be settled by this Court.

Chrysler Corporation is a United States manufacturer of motor vehicles and motor vehicle components. Chrysler's subsidiary in Mexico assembles passenger cars and trucks using many United States-origin components. The vehicles are then sold in the Mexican, Central American and United States markets. Subheading 9802 prevents Customs from imposing a duty on the value of United States-origin components used in the foreign assembly of imported goods when nonassembly operations performed on the components are "incidental" to assembly "such as . . . painting."

Customs has always granted a duty allowance under 9802 for most of the United States-origin components Chrysler de Mexico assembles into vehicles exported to the United States. Customs, however, determined that fully fabricated United States-origin exterior body components subjected to finish-coat painting during the assembly process are not entitled to the statutory exemption. According to Customs, the painting operations do not fall within the meaning of the statutory language permitting operations "incidental to the assembly process such as cleaning, lubricating and painting." According to

the Federal Circuit, under this statute, painting must undergo an economic analysis by Customs to ascertain whether the painting is "minor."

Chrysler filed an action in the Court of International Trade challenging Customs' refusal to grant the partial duty exemption. Based upon the Federal Circuit's decision in *General Motors Corp. v. United States*, 976 F.2d 716 (Fed. Cir. 1992) (App. 16), the Court of International Trade sustained Customs' determination. *Chrysler Corporation v. United States*, 20 CIT ___, slip op. 95-39 (Ct. Int'l Trade Mar. 13, 1995) (App. 7). Chrysler filed a notice of appeal on May 9, 1995 and the Federal Circuit docketed the appeal on June 6, 1995. Jurisdiction for the appeal was based upon 28 U.S.C. § 1295(a)(5). The Federal Circuit sustained the judgment of the Court of International Trade on March 22, 1996. *Chrysler Corporation v. United States*, No. 95-1366, 1996 U.S. App. Lexis 6368 (Fed. Cir. Mar. 22, 1996) (App. 1). The basis for the Federal Circuit's decision was *General Motors* and the decision of its predecessor court in *United States v. Mast Indus., Inc.*, 668 F.2d 501 (CCPA 1981).

It is well established that Customs classification is a question of law subject to *de novo* review. *Marcel Watch Co. v. United States*, 11 F.3d 1054, 1056 (Fed. Cir. 1993). Establishing the correct classification involves two questions: first, the meaning of the tariff provision and, second, whether the merchandise comes within the meaning of the properly construed provision. The first issue is a question of law subject to *de novo* review. The second issue is a question of fact reviewed for clear error. *Digital Equipment Corp. v. United States*, 889 F.2d 267, 268 (Fed. Cir. 1989).

REASONS FOR GRANTING THE WRIT

This case is very important to the importing community and presents a question of first impression to this Court. The administration of the tariff laws has a direct and significant impact on businesses throughout the United States. This Court has previously recognized the importance of the tariff laws when deciding whether to grant a petition for a writ of *certiorari*. *See, e.g.*, *Barr v. United States*, 324 U.S. 83, 85 (1945); *United States v. Bush & Co.*, 310 U.S. 371, 375-76 (1940).

Chrysler submits that the decision of the Federal Circuit requires review by this Court because it is based on two errors of law. First, the Federal Circuit ignored the plain meaning of the statute and basic principals of statutory construction long established by the Supreme Court. Specifically, the Federal Circuit's method of statutory interpretation is in conflict with this Court's instructions that, *inter alia*, unambiguous statutes are to be construed as written, *United States v. Turkette*, 452 U.S. 576, 580 (1981), that all words in a statute are to be given meaning, *Gustafson v. Alloyd Co.*, 115 S. Ct. 1061, 1069 (1995), and that an interpretation leading to absurd results is to be avoided, *Haggar Co. v. Helvering*, 308 U.S. 389, 394 (1940).

The Federal Circuit's departure from the methods of statutory interpretation sanctioned by the Supreme Court gives Customs unprecedented latitude in its interpretation of the *Harmonized Tariff Schedule* and, as a result, eliminates uniformity and predictability in Customs' application of the tariff laws. This will have a significant negative impact on the ability of importers to calculate the cost of their business operations and will

prevent the Customs from predictably administering the tariff laws.

Second, the Federal Circuit erred in failing to give effect to the plain meaning of 19 C.F.R. § 10.16(b) which Customs promulgated in a rulemaking process including public notice and comment. The longstanding regulation states without ambiguity that preservative painting is an acceptable operation within the context of a claim for the partial duty exemption. The Federal Circuit erroneously read the regulation to include a limitation that preservative painting operations also must be "minor" in nature to qualify under 9802. This is in conflict with decisions of this Court holding that administrative regulations are to be enforced consistent with their plain language. *Thomas Jefferson Univ. v. Shalala*, 129 L.Ed.2d 405, 415 (1994); *Gardebring v. Jenkins*, 485 U.S. 415, 430 (1988).

In addition, the Supreme Court should grant this petition for the practical reasons that this case presents the opportunity for the Court to settle presently unclear federal law and avoid continuing litigation before the Court of International Trade and the Federal Circuit. The Supreme Court has never reviewed a determination of import duties first made in the Court of International Trade and has never addressed any provision of the HTSUS. By accepting this petition, the Court will once again be recognizing the importance of international trade to the United States economy and providing renewed uniformity and predictability in international trade for United States manufacturers and importers.

I. The Federal Circuit's Decision Conflicts with Established Principles of Statutory Construction

Subheading 9802, when read to give effect to its plain meaning, defines painting as an operation that is incidental to assembly. The established rules of statutory construction, without resort to the legislative history or policy arguments, show that Congress intended to permit painting as part of foreign assembly operations without affecting the dutiable status of United States-origin components. The following sections A through D confirm that the Federal Circuit failed to apply the rules of statutory construction and, as a result, reached a conclusion inconsistent with congressional intent as embodied in the plain meaning of the statute.

A. Neither Legislative History Nor Policy Considerations Overcome the Clear Statutory Language

The Federal Circuit did not apply the maxims that "courts must presume that a legislature says in a statute what it means and means in a statute what it says there," *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253 (1992), and that where the language of a statute "is plain, 'the sole function of the court is to enforce it according to its terms.'" *United States v. Ron Pair Ent.*, 489 U.S. 235, 241 (1989) (quoting *Caminetti v. United States*, 242 U.S. 470, 485 (1917)). In short, if the intent of Congress is clear, that is the end of the matter; the court must give effect to the unambiguously expressed intent of Congress. *ETSI Pipeline Project v. Missouri*, 484 U.S. 495, 517 (1988).

Where, as here, an application of the rules of statutory construction show that there is no ambiguity in the

statute, a court may consider legislative history only to determine whether there is a clearly expressed legislative intention contrary to the statute. That review, however, does not start from a neutral viewpoint. The party challenging the plain meaning must make "an extraordinarily strong showing of clear legislative intent in order to convince [the Court] that Congress meant other than what it ultimately said." *Gardner v. Brown*, 5 F.3d 1456, 1459-60 (Fed. Cir. 1993), *aff'd*, 115 S. Ct. 552 (1994). The government made no such showing below. The Federal Circuit, therefore, erred when it resorted to legislative history to read a limitation into the clearly expressed statute. In this case, there is no limitation in the statute, either express or implied, such as that inferred by the Federal Circuit relating to "minor." *See Chrysler*, No. 95-1366 at 4 (App. 4). We respectfully submit that the Supreme Court should review the decision of the Federal Circuit in order to reaffirm the supremacy of statutory language in the process of interpretation.

B. The Federal Circuit's Interpretation of HTSUS Subheading 9802 Renders Some of Its Words Redundant

A court should avoid reading a statute in a way that renders some words altogether redundant. *Gustafson v. Alloyd Co.*, 115 S. Ct. 1061, 1069 (1995). In spite of this rule, the Federal Circuit's interpretation of 9802, renders the phrase "such as cleaning, lubricating and painting" completely without meaning. It is, therefore, incorrect.

Besides assembly, the statutory language permits "operations incidental to the assembly process such as cleaning, lubrication and painting." HTSUS subheading 9802.00.80. In *Chrysler*, No. 95-1366 at 4 (App. 4), and

General Motors, 976 F.2d at 720 (App. 20), the Federal Circuit read this language as subject to the additional and highly subjective limitation that incidental operations be "minor" in nature within the meaning of *United States v. Mast Indus., Inc.*, 668 F.2d 501, 506 (1981).

This reliance on *Mast*, however, is misplaced because that case did not address the meaning of the listed exemplars. Congress added the phrase "such as cleaning, lubricating and painting" to "enlarge" the scope of the statutory duty exemption. S. Rep. No. 530, 89th Cong., 1st Sess. 34, *reprinted in*, 1965 U.S. Code Cong. & Admin. News 3416, 3449. The Federal Circuit, however, treated the amendment as merely a list of potentially incidental operations. *General Motors*, 976 F.2d at 720 (App. 20). That construction of the amendment renders it meaningless because it adds nothing to the scope of the statute which already permitted "operations incidental to the assembly process." The only way to give meaning to the exemplars is to read them as operations that Congress defined as incidental to assembly.

Further, the Federal Circuit should not have treated the exemplars as limited to minor operations by the word "incidental." Rather, under the canon *ejusdem generis*, "incidental" is limited to operations similar in nature to painting, cleaning and lubricating. The Federal Circuit has inverted this canon and, as result, effectively removed the exemplars from the statute.

Congress did not do a useless act when it added the exemplars to 9802. Accordingly, we urge the Supreme Court to consider the principles of statutory construction it applied in *Gustafson* and many other cases and find that the Federal Circuit's approach to statutory construction should be reviewed on a writ of *certiorari*.

C. The Federal Circuit did not Read 9802 *In Pari Materia* with Similar Language in the Tariff Schedule

The *General Motors* ruling is also at odds with the canon of statutory construction that courts are to give identical language the same meaning throughout a statute. *Helvering v. Stockholms Enskilda Bank*, 293 U.S. 84, 87 (1934) (quoting *Atlantic Cleaners & Dryers, Inc. v. United States*, 286 U.S. 427, 433 (1932)).

The HTSUS contains many instances of general language followed by specific exemplars. Many of those use "such as" before the exemplars. Under the Federal Circuit's decision in *General Motors*, Customs may construe exemplars in the HTSUS not as items or processes determined by Congress to fit the meaning of the general language, but merely as exemplars that Customs *may* find fit the general description *provided* they meet additional and possibly unknown conditions Customs has decided to impose. *See General Motors*, 976 F.2d at 719 (App. 20). *Chrysler* and *General Motors*, in effect, give Customs discretion in reading the HTSUS beyond that intended by Congress and take certainty and predictability away from importers.

An example of this is Note 1(p) to HTSUS Chapter 95 which states that "This chapter does not cover . . . [s]ports craft such as canoes and skiffs (chapter 89). . . ." Under this Note, Customs may not classify canoes and skiffs in HTSUS Chapter 95 but must classify them as sports craft in Chapter 89. The proper role for Customs is to decide whether imported merchandise fits within the meaning of an exemplar. Customs, therefore, may ask whether the article is a canoe but may not add limitations to the type of canoes which are to be classified in

Chapter 89. Customs cannot, for example, exclude fiberglass canoes or six-person canoes from the operation of the Chapter Note. Nevertheless, the construction the Federal Circuit has adopted permits such inconsistent and unpredictable applications of the tariff laws. The decision of the Federal Circuit, therefore, should be reviewed so that this Court may prevent any further erosions of the clarity of the HTSUS.

D. The Federal Circuit's Reading of 9802 Produces Absurd Results and Cannot be Fairly Administered

The Supreme Court has long held that courts must avoid any reading of a statute that leads to absurd results when the courts can give the statute a reasonable application consistent with its words and legislative purpose. *Haggar Co. v. Helvering*, 308 U.S. 389, 394 (1940). The Federal Circuit ignored this rule when it adopted a reading of 9802 that leads to absurd results.

In *General Motors* and *Chrysler*, the Federal Circuit looked at, *inter alia*, the relative value of the investment in machinery and equipment in the assembly plant paint shop as compared with the body shop to determine whether painting is a "minor" operation. *General Motors*, 976 F.2d at 721 (App. 24); *Chrysler*, No. 95-1366 at 3 (App. 3). An investment in new painting equipment, therefore, could render a previously incidental, or "minor," painting process no longer incidental to assembly. *General Motors*, 976 F.2d at 722 n.2 (Nies, dissenting) (App. 29). Over the life of an assembly plant, Customs could periodically deem painting operations to be nonincidental depending on plant investment and depreciation. Consequently, the dutiable status of the imported

product would change over time though the fundamental nature of the process at issue—painting—remains unchanged. This discriminates against companies, such as Chrysler and General Motors, that have expensive, modern, environmentally responsible paint shops in their assembly plants while favoring assemblers with antiquated paint facilities.

Another reason this interpretation of the statute leads to absurd results is the fact that it may be impossible for an importer to know whether its products will qualify for 9802 treatment. Where the importer is not related to the foreign assembler, the importer may have no way of knowing how the investment in the machinery that performs the challenged operation compares with the investment in other machinery and equipment used in the assembly process. Even where it has access to this information an importer may need an extensive and costly analysis of actual cost data to be able to verify those claims for the partial duty exemption. *See, e.g.*, *Chrysler*, 20 CIT at ___, slip op. at 7 (App. 13). That cost data may not be available until after the importation has occurred. Finally, the burden on Customs will increase to the extent that it must now review and verify that data to determine whether painting is a "minor" operation.

The simplest and most logical way for the Court to avoid these problems is to apply the statute the way Congress wrote it. In order to fulfill Congressional intent, Chrysler asks that this Court grant this petition for a writ of *certiorari* and review the interpretation the Federal Circuit has given 9802.

II. The Federal Circuit Ignored the Plain Language of the Applicable Customs Regulation Permitting Preservative Painting

The Supreme Court has established that properly promulgated substantive agency regulations have the force and effect of law. *Chrysler Corp. v. Brown*, 441 U.S. 281, 295 1(1979). According to *United States v. Nixon*, 418 U.S. 683, 696 (1974), so long as a regulation remains in effect, the agency and the United States are "bound to respect and to enforce it." Customs, like all other federal agencies, must abide by its own regulations. *Fort Stewart School v. Federal Labor Relations Auth.*, 495 U.S. 641, 654 (1990).

The regulation, 19 C.F.R. § 10.16(b), states that operations incidental to assembly "shall not preclude" the application of the partial duty exemption and that "[t]he following are examples of operations which are incidental to the assembly process . . . [a]pplication of preservative paint. . . ." There is no qualification relating to painting other than that it be preservative. Thus, the application of preservative paint is by definition an operation incidental to assembly. In *Chrysler*, the Court of International Trade found that the painting operation is primarily preservative in nature. *Chrysler*, 20 CIT ___, slip op. at 5-6 (App. 11-12).

The Federal Circuit, however, agreed with Customs that the regulation includes a limitation requiring not only that painting be preservative but also that its application be a "minor" process. *Chrysler*, No. 95-1366 at 5 (App. 5). This conclusion is at odds with the plain meaning of the regulation. An agency's interpretation of its regulations is not entitled to judicial deference when it is inconsistent with the plain meaning of the regula-

tion. *Mullins Coal Co. v. Director, OWCP*, 484 U.S. 135, 159 (1987). Where an agency's interpretation of its regulations does not "sensibly conform to the purpose and wording of the regulations" the Court should give it no credence. *Northern Indiana Pub. Serv. Co. v. Porter County Chapter of Izaak Walton League of Am., Inc.*, 423 U.S. 12, 15 (1975). Based on these controlling precedents, Chrysler submits that the Federal Circuit has impermissibly allowed Customs to amend an otherwise clear regulation without first engaging in the required process of public notice and comment. The Federal Circuit has also sanctioned an agency's reading of a regulation that is at odds with its language.

This decision undermines the effectiveness of the trade laws by removing an easily administrable test that had predictable results for the specified incidental operations. Predictability is necessary for the orderly conduct of business. *Hemschmeidt Corp. v. United States*, 72 F.3d 868, 872 (Fed. Cir. 1995). Creating an easily administered test was the purpose for the amendment which added the disputed language to the predecessor statute. *See* H.R. Rep. No. 342, 89th Cong., 1st Sess. 48 (1965) (ambiguity in the prior law resulted in "undue administrative burdens on customs officers."). It was also the reason Customs adopted a regulation setting out a bright line test for acceptable incidental operations such as painting. A grant of *certiorari* will give the Supreme Court the opportunity to fulfill congressional intentions by reversing the decision below, providing business certainty and reducing the administrative burden upon importers and Customs.

III. Review by the Supreme Court is Necessary to Eliminate Uncertainty and Avoid Repetitive Litigation

The importance of this case to the importing community is clear from the value of the 9802 benefits to industry. In 1990, one of the years at issue in this case, $1.8 billion in transportation equipment (including cars and trucks) entered the United States under 9802 just from Mexico. *Production Sharing: Use of U.S. Components and Materials in Foreign Assembly Operations, 1990-1993*, U.S. Int'l Trade Comm. Pub. 2886, 1993 Annual Report Investigation No. 332-237, Table 2-3, p. 2-6 (1995). The automobile industry is not alone in its reliance on 9802. In 1993, for example, $12.1 billion in electronic equipment entered the United States claiming the benefit of 9802 with the value of United States-origin components exceeding $5.2 billion. *Id.* at Table 2-4, p. 2-9. Also in 1993, the nonautomotive machinery industry relied on the re-importation of American-made materials under 9802 for a duty savings of $94.6 million. *Id.* at Table 2-8, p. 2-15. Finally, the use of 9802 in the textile, apparel and footwear industry is substantial. In 1993, the total 9802 duty-free value of American-made components imported was $3.48 billion, *Id.* at Table 2-10, p. 2-20, with a total duty savings $591.8 million, *Id.* at Table 2-11, p. 2-20. These figures underscore what the Supreme Court has previously recognized: the importance of the calculation of import duties as a reason for granting a writ of *certiorari*. *Barr v. United States*, 324 U.S. 83, 85 (1945); *United States v. Bush & Co.*, 310 U.S. 371, 375-76 (1940).

An importer dissatisfied with Customs' classification of merchandise may challenge that decision through an administrative protest. 19 U.S.C. § 1514(a)(2). Jurisdic-

tion to review Customs' denial of a protest rests exclusively with the Court of International Trade, 28 U.S.C. § 1581(a), and appellate review is exclusively within the jurisdiction of the Federal Circuit, 28 U.S.C. § 1295(a)(5). Consequently, it is impossible for this issue to come before the Supreme Court with a split of authority in the regional circuits.

Despite the lack of a split among the circuits, among the federal judges who have considered this issue, there is a conflict as to the correct reading of the statute. In her dissent in *General Motors*, former Federal Circuit Chief Judge Nies looked at the same language in the predecessor statute and stated that "the specific mention of painting is at a minimum a strong indication that the type of painting in issue is the exact type of activity [the statute] was amended to allow." *General Motors*, 976 F.2d at 721 (App. 27). Similarly, Judge Tsoucalas of the Court of International Trade held that the language in the statute was sufficiently clear to evidence a congressional intention to include painting in the class of operations that is incidental to assembly. *General Motors Corp. v. United States*, 15 CIT 372, 379-80, 770 F. Supp. 641, 647 (1991) (App. 45-46).

Judge Restani's opinion for the Court of International Trade clearly shows her view that the Federal Circuit's decision in *General Motors* is based on an incorrect interpretation of the statute and results in a test that is unworkable. Judge Restani stated that:

> Painting operations that are such an integral part of the assembly process, as the painting processes at issue here, may have been intended by Congress to be found "incidental to assembly." The plain terms of the statute support such a

> reading and Congress may have intended to draw a clearer line than the courts are recognizing. The result of such a line would be a more administrable statute and the fulfillment of the Congressional intent to promote the use of United States made components in assembly abroad.

Chrysler, 20 CIT at ___, slip op. at 7 (App. 12-13) (citations and footnotes omitted). Finally, it is significant that the Federal Circuit based its decision in part on that court's rule that prior decisions of a panel of the court are binding precedent on subsequent panels unless and until overturned *in banc*. *Chrysler*, No. 95-1366 (App. 6). This may indicate less than complete confidence in the legal determination and a greater desire that the issue be decided consistently within the Federal Circuit.

There is, therefore, a degree of judicial skepticism that this issue has been properly and finally decided. This fact and the value of 9802 benefits as discussed above are reflected in the number of cases importers have filed before the Court of International Trade seeking to raise the same or similar issues regarding 9802. General Motors has two cases on the docket of the Court of International Trade (Court Numbers 93-10-666 and 95-6-00754). In addition, several nonautomotive companies have similar issues before that court including Levi Straus & Co. (Court Nos. 93-11-00726 and 95-01-00008), Hagar Apparel (93-06-00343), Spencer Industries (Court No. 94-12-00754) and Cygene Design (Court No. 95-06-794). By accepting this case for review, the Supreme Court will finally resolve the lingering questions of the correct interpretation of 9802 and 19 C.F.R. § 10.16(b) and, as result, remove the need for repetitive litigation.

CONCLUSION

International trade is important at all levels of American business. This case is of particular interest to American-based manufacturers of parts and components sent to foreign assemblers and manufacturers. This case is also important to United States-based vertically integrated multinational companies that retain highly technical part and subassembly production jobs in the United States while employing final assembly labor throughout the world. These United States manufacturers are engaging in the practice Congress intended to protect and foster when it enacted 9802 and amended it to cover the very issue presented in this case. The Customs Service, however, has cut the congressional policy out from under 9802 by adding new and indefinite limitations to its application.

The law is clear. HTSUS subheading 9802 identifies painting as an operation that Congress deems incidental to foreign assembly operations. To find otherwise removes all meaning from the word and would be inconsistent with the language of other provisions of the tariff schedule. Thus, in *General Motors,* the Federal Circuit incorrectly misinterpreted the statutory language and led the Court of International Trade to sustain Customs' determination. We submit that the Supreme Court should grant *certiorari* to correct the Federal Circuit's ruling which is inconsistent with many Supreme Court decisions regarding the interpretation of statutes.

The Customs Regulations specifically permit an importer to conduct preservative painting operations as part of a foreign assembly operation. 19 C.F.R. § 10.16(b)(3). The Court of International Trade found as a fact that the painting operations performed in Mexico on the compo-

nents at issue are overwhelmingly preservative in nature. Accordingly, the Court of International Trade's decision upholding Customs' denial of 9802 treatment for those parts and the Federal Circuit's affirmation is not consistent with the plain language of the regulation. The Supreme Court should grant *certiorari* to correct the Federal Circuit's failure to give proper weight to the plain meaning of a clear regulation.

Finally, the Supreme Court should again recognize the importance of import duties to American business and agree to review this case to restore uniformity and predictability to this area of law. A clear statement from the Court on the proper interpretation of 9802 and 19 C.F.R. § 10.16(b) will permit United States manufacturers selling parts to foreign assembly operations and United States companies with assembly plants throughout the world to plan their business activities with reliability and exactness. The added clarity of a Supreme Court decision will also likely eliminate the need for future litigation including those cases pending before the Court of International Trade.

Respectfully submitted,

ROBERT E. BURKE
(Counsel of Record)
DONALD J. UNGER
LAWRENCE M. FRIEDMAN
BARNES, RICHARDSON & COLBURN
200 East Randolph Drive
Suite 7920
Chicago, Illinois 60601
(312) 565-2000
Attorneys for Petitioner

June 19, 1996

APPENDIX

NOTE: Pursuant to Fed. Cir. R. 47.6, this disposition is not citable as precedent. It is a public record. The disposition will appear in tables published periodically.

United States Court of Appeals
for the Federal Circuit

95-1366

CHRYSLER CORPORATION,

Plaintiff-Appellant,

v.

THE UNITED STATES,

Defendant-Appellee.

DECIDED: March 22, 1996

Before: NEWMAN, MAYER, and LOURIE, *Circuit Judges*.

LOURIE, *Circuit Judge*.

DECISION

Chrysler Corporation appeals from a judgment of the United States Court of International Trade denying Chrysler duty-free treatment for certain sheet metal components that were manufactured in the United States and assembled into motor vehicles abroad before re-entry into the United States. *Chrysler Corp. v. United States*, No. 92-01-00005-S, 1995 Ct. Intl. Trade LEXIS 66 (Ct. Int'l Trade Mar. 14, 1995). Because Chrysler has not demonstrated error in the court's decision, we *affirm*.

DISCUSSION

Chrysler manufactured sheet metal parts in the United States for use in the production of motor vehicles. The parts were then shipped to two plants in Mexico, where they were assembled with other components into finished motor vehicles. During the assembly operation, the sheet metal parts were painted by a multi-step process that involved applying zinc phosphate, primer, sealant, antichip coating, color coats, and an outer clear coat sealant.

Upon re-entry of the completed vehicles into the United States, Chrysler sought a tariff allowance for the value of the sheet metal components. Chrysler relied on item 9802.00.80 of the Harmonized Tariff Schedule of the United States (1990) ("HTSUS"), which provides a duty exemption for components that meet the following criteria:

> Articles assembled abroad in whole or in part of fabricated components, the product of the United States, which (a) were exported in condition ready for assembly without further fabrication, (b) have not lost their physical identity in such articles by change in form, shape or otherwise, and (c) *have not been advanced in value or improved in condition abroad except by operations incidental to the assembly process such as cleaning, lubricating and painting*. [Emphasis added].

Item 9802.00.80, HTSUS. The United States Customs Service ("Customs") denied Chrysler a duty exemption, asserting that the sheet metal parts had been "advanced in value" and thus were dutiable. After its administrative protest was denied, Chrysler filed suit in the United States Court of International Trade challenging Customs' denial of a trade allowance for the disputed parts.

The court, applying *General Motors Corp. v. United States*, 976 F.2d 716 (Fed. Cir. 1992), entered judgment for the United States. The dispositive issue, the court stated, was whether the painting operations as a whole were of a "minor nature" so as to fall within the "incidental to the assembly process" exception under item 9802.00.80, HTSUS.* The court stated that, consistent with *General Motors*, two factors were relevant to this question: (1) a comparison of the cost of painting operations to the cost of the affected components, and (2) a comparison of the investment in painting operations to the investment in the body shop. The court found that these factors did not favor Chrysler, because the painting operations as a whole accounted for 30-40% of the total cost of the affected components, and the capital investment in paint shop operations was substantial compared to body shop investment. The court therefore held that the painting operations at the Mexican assembly plants were not "minor" and thus were not "incidental to the assembly process." Accordingly, the court entered judgment for the United States.

Chrysler raises three principal arguments on appeal. First, Chrysler contends that item 9802.00.80, HTSUS, itself provides that all painting operations are "incidental to the assembly process" without regard to quantitative or qualitative comparisons between the painting and

---

* It was not disputed that the components had been exported in condition ready for assembly without further fabrication and that they had not lost their physical identity. *See* item 9802.00.80, HTSUS. It was also not disputed that the parts had been "advanced in value," unless the painting operations were determined to have been "incidental to the assembly process."

other operations. Second, Chrysler argues that 19 C.F.R. § 10.16 (1990) specifies that primarily preservative painting operations will be treated by Customs as "incidental to the assembly process." Thus, because the court found that 70% of the overall painting operations for both Mexican plants were for preservative purposes, Chrysler contends that the court should have held that the painting operations met the requirements for the exemption under item 9802.00.80, HTSUS. Third, Chrysler asserts that the court misapplied *General Motors* when it did not consider the factual distinctions between that case and Chrysler's and rejected other bases for comparing the painting and assembly operations.

The government responds, *inter alia*, that our decision in *General Motors* controls this case and mandates an affirmance of the court's decision. We agree with the government. In *General Motors*, we held that, consistent with the decisions of our predecessor court, only minor operations incidental to assembly may be given duty-free treatment under item 807.00, Tariff Schedules of the United States (1986) ("HTSUS"), the predecessor to item 9802.00.80, HTSUS. *General Motors*, 976 F.2d at 719-20. The legislative history supported our interpretation of the tariff provision. *See* H.R. Rep. No. 342, 89th Cong., 1st Sess. 49 (1965); *see also United States v. Mast Indus., Inc.*, 69 C.C.P.A. 47, 668 F.2d 501, 506 (CCPA 1981) ("Operations [such] as applying preservative coatings and testing and adjusting the components are incidental to the assembly process 'if of a minor nature.'") (quoting legislative history). We rejected General Motors' argument that, under the plain language of the statute, all painting operations are "incidental to the assembly process." Rather, we held that "the statute's reference to 'painting'

is simply an exemplar of an operation which is potentially 'incidental to the assembly process,' not a definitive statement that all painting operations, no matter how extensive, are allowed under item 807.00(c)." *General Motors*, 976 F.2d at 719.

Here, as the Court of International Trade recognized, there are no relevant differences between the tariff provision interpreted in *General Motors*, item 807.00, HTSUS, and item 9802.00.80, HTSUS. Thus, Chrysler's first argument, that the plain language of the statute mandates a duty exemption, was rejected by the court in *General Motors*.

In addition, we cannot accept Chrysler's contention that the court misapplied 19 C.F.R. § 10.16. Although the regulation arguably suggests that primarily preservative painting operations may be treated by Customs as "incidental to the assembly process," the regulation must be read in light of *General Motors*. Thus, as the court stated, even though a painting process may have an overall preservative purpose, it will be dutiable if it is not "minor" in terms of the cost comparisons found determinative in *General Motors*. The court did not err in finding that these cost factors were not in Chrysler's favor. Further, the regulation itself provides that "any *significant* process, operation, or treatment . . . shall not be regarded as incidental to the assembly and shall preclude the application of the exemption to such article (emphasis added)." 19 C.F.R. § 10.16(c). As an example of a nonexempt operation, the regulation lists "painting primarily intended to enhance the appearance of an article or to impart distinctive features or characteristics." 19 C.F.R. § 10.16(c)(3). Chrysler has not persuaded us that its painting operations were not significant or that

they were not primarily intended to enhance the appearance of or to impart distinctive characteristics to the sheet metal parts.

Furthermore, since we conclude that the court correctly applied *General Motors*, we also reject Chrysler's contention that the court erred in not considering any factual distinctions between Chrysler's case and *General Motors* and in rejecting other possible bases for comparing the painting and assembly operations. We have considered Chrysler's remaining arguments, but find them unpersuasive.

Thus, because "this court has adopted the rule that prior decisions of a panel of the court are binding precedent on subsequent panels unless and until overturned *in banc*," *Newell Cos. v. Kenney Manufacturing Co.*, 864 F.2d 757, 765, 9 U.S.P.Q.2D (BNA) 1417, 1423 (Fed. Cir. 1988), *cert. denied*, 493 U.S. 814, 107 L. Ed. 2d 30, 110 S. Ct. 62 (1989), and this case is controlled by our interpretation of the comparable relevant tariff provision in *General Motors*, we affirm the decision of the Court of International Trade.

App. 7

[Dated March 14, 1995]

UNITED STATES COURT OF INTERNATIONAL TRADE

CHRYSLER CORPORATION, Plaintiff, v. THE UNITED STATES, Defendant.	Court No. 92-01-00005-S

[Judgment for defendant.]

Barnes, Richardson & Colburn (*Robert E. Burke, Donald J. Unger* and *Lawrence M. Friedman*) for plaintiff.

Frank W. Hunger, Assistant Attorney General, *Joseph I. Liebman*, Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Saul Davis*) for defendant.

OPINION

RESTANI, Judge: This matter is before the court for decision following trial. The issue is whether certain fabricated sheet metal components of automobiles and trucks, that were coated with finish paint in connection with assembly in Mexico, are entitled to duty-free treatment under item 9802.00.80 of the Harmonized Tariff

Schedule of the United States ("HTSUS").[1] This issue was for all intents and purposes resolved in *General Motors Corp. v. United States*, 976 F.2d 716 (Fed. Cir. 1992), in which the predecessor statute was applied. *Id.* at 720-21 (finding finish coat painting operations for sheet metal components of automobiles not "incidental to the assembly process," and thus not entitled to duty exemption as American Goods Returned). There are no relevant differences in the current statute. Furthermore, the holding of the Federal Circuit in *General Motors* renders nondeterminative the factual distinctions established by plaintiff.

This matter is best explained by first describing plaintiff's assembly process, which is similar for both the Toluca car plant and the Lago Alberto truck plant in Mexico.[2] All of the components at issue were manufac-

---

[1] The HTSUS provides in pertinent part:

9802.00.80 Articles assembled abroad in whole or in part of fabricated components, the product of the United States, which (a) were exported in condition ready for assembly without further fabrication, (b) have not lost their physical identity in such articles by change in form, shape or otherwise, and (c) have not been advanced in value or improved in condition abroad except by being assembled and except by operations incidental to the assembly process such as cleaning, lubricating and painting.

HTSUS, USITC Pub. 2232, sec. XXII, ch. 98, subch. II, item 9802.00.80 (Supp. 2 1990); *id.*, USITC Pub. 2030, sec. XXII, ch. 98, subch. II, item 9802.00.80 (Supp. 4 1989).

[2] As part of the trial of this matter, the court viewed both assembly operations located in Mexico. The models involved are the K-body car (Dodge Aries, Plymouth Reliant), the

(continued...)

tured in the United States. In the initial stages of assembly, sheet metal components are welded together in the body shop. A metal finishing operation takes place to locate and detect any defects and to prepare the body for painting. The parties disagree as to whether metal finishing is part of the painting process. Although it appears more closely related to the painting process, resolution of this matter is not dispositive. The disputed processes all occur in connection with the paint operation. This begins with cleaning, a phosphate application to prepare the metal body for primer, some sealing, anti-chip coating application, baking, application of one or two color coats and a clear coat, followed by more baking.[3]

Following the painting operations, the body travels to the trim line where various trim components and subassemblies thereof are added to the body, such as instrument panels and window controls. Towards the end of the car assembly process, the engine and other essential components are mounted to the body. In the truck plant, the chassis is assembled separately and is joined with the trimmed body. Throughout the process various inspections take place and the entire assembly ends with final testing.

There is no dispute that the components at issue were exported in condition ready for assembly without further

---

[2] (...continued)
Chrysler LeBaron, the Dodge Ramcharger and the Dodge Clubcab. The last two are assembled at the Lago Alberto plant.

[3] The sealing operations observed by the court appear more related to the assembly process than to painting, but the parties did not discuss this distinction.

fabrication, that they have not lost their physical identity, and that they have been advanced in value or improved in condition. *See* Item 9802.00.80, HTSUS. Furthermore, as in *General Motors*, *see* 976 F.2d at 720, there is no doubt that the painting must be done after welding and before trimming, so that the painting operations are clearly an essential part of the assembly process.[4] Thus, the question that remains, according to *General Motors*, is whether the painting process as a whole is of a "minor nature." *Id.*

Plaintiff cannot succeed in this matter because, in relation to auto assembly, the *General Motors* court found two factors dispositive: (1) comparison of the cost of painting operations to the cost of the affected components, and (2) comparison of investment in painting operations to the investment in the body shop. *See General Motors*, 976 F.2d at 720-21. Those factors are not in plaintiff's favor here. First, the painting process as a whole accounts for between 30 and 40 percent of the total cost of the affected components[5] and the capital in-

---

[4] Painting must take place after welding to avoid disruption of the anti-corrosive paint film by the welding process. Painting also cannot be performed at the end of the assembly process because, among other problems, baking would warp or melt various parts. In addition, there would be a loss of anti-corrosive coverage of the substrate.

[5] *See* Def.'s Ex. U. The court finds defendant's Exhibit U more accurately reflects the cost of painting in comparison to the affected components than does any part of plaintiff's Exhibit 18. Even granting plaintiff's arguments on metal finishing some credence, it is unlikely that the painting to body shop percentages would fall below 25%. *See id.* and testimony of Efrain Pena as to percentage changes to plaintiff's figures, adjusting for defendant's view of metal finishing.

vestment in paint shop operations is substantial in comparison to body shop investment. While paint investment is not five times greater as it was in *General Motors*, 976 F.2d at 721, paint investment still equals or exceeds that of the body shop. *See* Pl.'s Ex. 18. Under these criteria, painting operations at the Mexican assembly plants are not of a minor nature.

Plaintiff raises another issue that was not discussed in *General Motors*, but was an issue in that case as well. Under 19 C.F.R. § 10.16(c) (1990), examples of dutiable operations considered by Customs not to be "incidental to the assembly process" include painting operations primarily intended to enhance the appearance of an article.[6] Thus, here Customs did not duty components which were primed, but not finish coated. Plaintiff argues that the entire painting process is a preservative paint system and is not dutiable under the regulation.[7] The court agrees that plaintiff established at trial, through the testimony of Dennis P. Coleman, that approximately 70 percent of the entire paint system for both Mexican plants is intended primarily for preservative purposes.[8] As to the top coats, it is impossible to separate their

---

[6] Under 19 C.F.R. § 10.16(b), preservative painting is an example of a non-dutiable operation, when performed as part of the assembly process.

[7] *General Motors*, 976 F.2d at 720, directs that to qualify for duty-free treatment, the entire advancement by the coating operations is to be considered, not simply the top coats.

[8] Contrary to defendant's contention, Customs' prior factual findings are entitled to no weight. Actions under 28 U.S.C. § 1581(a) (1988), such as the case at hand, are tried *de novo*. 28 U.S.C. § 2640(a)(1) (1988); *see ITT Corp. v. United States*, 24 F.3d 1384, 1389 (Fed. Cir. 1994); *China Diesel Imports, Inc. v. United States*, 855 F. Supp. 380, 385 (Ct. Int'l Trade 1994).

appearance-enhancing features from their preservative functions. Indeed, any preservative coating, like most painting, is intended to maintain both structural integrity and a more superficial appearance. Besides providing sealing, the top coats contain ultraviolet absorbers and free radical scavenger substances to prevent the breakdown of the underlying anti-corrosives, according to the testimony of Dr. Clifford Schoff. Nonetheless, plaintiff cannot succeed. Under *General Motors*, the question still remains—is the entire painting process of a minor nature.[9] In order to apply *General Motors*, the regulation must be read as qualified by this test. Accordingly, even though a painting process has an overall preservative purpose, it will be dutiable if it is not "minor" in terms of the cost comparisons found determinative in *General Motors*. As indicated, the cost of the painting and the investment involved are not minor in relation to the cost and investment for the affected components.

Having arrived at this conclusion, the court notes that this approach raises several concerns that are pointed out by the dissent in *General Motors*. *See* 976 F.2d at 721-23. Painting operations that are such an integral part of the assembly process, as the painting processes at issue here, may have been intended by Congress to be found "incidental to assembly." *Id.* at 722. The plain

---

[9] The court rejects defendant's argument that because substantial corporate time is spent on the marketing issues involving color choice, painting operations are not minor. Marketing issues affect the entire automobile, including the shape of the affected sheet metal components. There was no evidence on the amount of marketing effort spent on non-painting elements. Thus, no comparisons are possible as to marketing.

terms of the statute support such a reading and Congress may have intended to draw a clearer line than the courts are recognizing.[10] The result of such a line would be a more administrable statute and fulfillment of the Congressional intent to promote use of United States made components in assembly abroad.[11] In this case, auditors for each side performed studies requiring approximately 700 hours each in an attempt to determine if the painting operations were of a "minor nature," a somewhat nebulous test.

The *General Motors* court found sub-tests measuring the value or cost of painting operations in comparison to the entire assembly of the imported article, tests that largely favor the assembler, to be of "little weight." *See* 976 F.2d at 720 (discussing specifically time and labor

---

[10] The court notes that the legislative history is more ambiguous and is not inconsistent with the *General Motors* interpretation. *See* H.R. Rep. No. 342, 89th Cong., 1st Sess. 49 (1965). The *General Motors* majority adopts the word "minor," which is found in the legislative history, and makes it part of the statutory test. The dissent focuses only on the statutory term "incidental," and its meaning as subordinate or occurring as a consequence of, although the word "incidental" has several meanings, including "occurring as a minor concomitant." *Webster's Third New International Dictionary* 1142 (Philip Babcock Gove et al. eds., 1981).

[11] Customs' regulation is directed towards establishing a clearer test. "Painting" in the statute, however, is not defined as "non-decorative preservative painting." *See* Item 9802.00.80, HTSUS; *see also* 19 U.S.C. § 1202 (1988). Thus, to this court, the regulation appears to be inconsistent with the statute, and would be entitled to no deference. Of course, the regulation may be inconsistent with the statute, as interpreted by *General Motors,* if it exempts all "preservative" painting, no matter how costly. 976 F.2d at 719-20.

comparisons).[12] The tests chosen in *General Motors* for this product do not favor plaintiff. Why the tests relied upon in *General Motors* are particularly determinative as to painting operations that are integral to assembly is not clear to the court. Cases such as *United States v. Mast Indus., Inc.*, 668 F.2d 501 (C.C.P.A. 1981) (buttonholing and pants pocket slitting operations), and *United States v. Oxford Indus., Inc.*, 668 F.2d 507 (C.C.P.A. 1981) (buttonholing operation), in which various cost comparison tests are set forth, and which the *General Motors* court found applicable, *see* 976 F.2d at 719-20, may not in actuality provide much guidance, as they do not treat "cleaning," "lubricating" or "painting" processes, as set forth in the statute.

Judge Nies, in dissent in *General Motors*, indicated that if a painting operation must be done as an integral part of the assembly process, it is incidental to assembly and the affected components are not dutiable. 976 F.2d at 722-23. This is an appealing interpretation of the statute, for the reasons set forth, but it is not the current law. Accordingly, judgment is rendered in favor of defendant.

Jane A. Restani
JUDGE

Dated: New York, New York
This 14th day of March, 1995.

---

[12] By some measures, the cost of painting operations was less than 5 percent of the total cost of the imported vehicle. The painting percentage for the Dodge Clubcab was slightly higher. *See* Pl.'s Ex. 18 (cost breakdown by vehicle type).

JUDGMENT

UNITED STATES COURT OF INTERNATIONAL TRADE

JANE A. RESTANI, JUDGE

CHRYSLER CORPORATION, Plaintiff, v. THE UNITED STATES, Defendant.	Court No. 92-01-00005-S

This case having been submitted for decision and the Court, after deliberation, having rendered a decision therein; now, in conformity with that decision,

IT IS HEREBY ORDERED: that judgment is rendered in favor of defendant.

Jane A. Restani
Judge of the United States
Court of International Trade

Dated: New York, New York
this 14th day of March, 1995.

United States Court of Appeals
for the Federal Circuit

91-1518

GENERAL MOTORS CORPORATION,

Plaintiff-Appellee,

v.

THE UNITED STATES,

Defendant-Appellant.

DECIDED: October 8, 1992

Before NIES, *Chief Judge*, ARCHER and MAYER, *Circuit Judges*.

MAYER, *Circuit Judge*.

DECISION

The government appeals the judgment of the Court of International Trade, 770 F. Supp. 641 (1991), that certain motor vehicle components are eligible for the trade allowance provided in item 807.00, Tariff Schedules of the United States (TSUS), despite a contrary determination by the United States Customs Service. We reverse.

BACKGROUND

During 1986 and 1987, General Motors Corporation (GM) manufactured in the United States various sheet

metal components for use in the production of motor vehicles. These components were shipped to Mexico and assembled, along with other components, into finished vehicles in GM's Ramos Arizpe assembly plant.

The Ramos Arizpe assembly process is described as consisting of five operation groups: body shop, paint shop, chassis line, trim shop, and final process. In the first group, body shop, major component subassemblies are fitted together and spot welded to create the body of the automobile. In the second group, paint shop, the body is cleaned and sprayed with a protective zinc phosphate compound, submerged in an electro deposition primer tank, baked, sanded, treated with a sealant, and then baked again. This is followed by an application of surface primer. At this point, topcoat (finish) paint is applied and the body is oven cured. Finally the body is waxed and sent along to the trim shop.

In the trim shop, certain internal components are installed and water testing is performed. Next, in chassis, while the radiator, grille, and gas tank are attached to the body, the engine, transmission, and frame are independently subassembled on a separate conveyor. The body and frame are then joined, and the bumpers, radiator, and tires are installed. The last operation is final process wherein manual detail work, sundry inspections, wheel alignment, and final drive tests are performed. The finished vehicle is then reshipped to the United States for sale.

Upon the re-entry of the vehicles at issue here into the United States, GM sought a tariff allowance for the value of the sheet metal components manufactured in the United States, in accordance with item 807.00, TSUS. Customs granted allowances on some of the com-

ponents, but, in accordance with its regulation,* denied the allowance to components that had undergone topcoat (finish) painting, because:

> Finish painting vehicle parts is not of such a minor nature as to be considered incidental to the main assembly process. . . . Finish painting amounts to a fabrication that advances the vehicles in value and condition, beyond the meaning of [item 807.00].

After denial of its administrative protest, see 19 U.S.C. § 1514 (1988), GM filed suit in the Court of International Trade challenging Customs' denial of the trade allowance on the disputed components. See 28 U.S.C. § 1581(a) (1988).

On July 23, 1991, the court entered judgment in favor of GM, holding that the topcoat painting operations were minor and clearly subordinate to the assembly process

---

* 19 C.F.R. § 10.16 (1986), in relevant part, provides:

> (c) Operations not incidental to the assembly process. Any significant process, operation, or treatment other than assembly whose primary purpose is the fabrication, completion, physical or chemical improvement of a component, or which is not related to the assembly process, whether or not it effects a substantial transformation of the article, shall not be regarded as incidental to the assembly and shall preclude the application of the exemption to such article. The following are examples of operations not considered incidental to the assembly as provided under item 807.00, Tariff Schedules of the United States (19 U.S.C. 1202):
>
> * * *
>
> (3) Painting primarily intended to enhance the appearance of an article or to impart distinctive features or characteristics . . . .

and, accordingly, were "incidental to assembly" as required for item 807.00 treatment. 770 F. Supp. at 648. The court ordered Customs to reliquidate the entries and refund excess duties paid, with interest, to GM. *Id.* at 642.

DISCUSSION

Item 807.00, TSUS (1986), provides that:

> Articles assembled abroad in whole or in part of fabricated components, the product of the United States, which (a) were exported in condition ready for assembly without further fabrication, (b) have not lost their physical identity in such articles by change in form, shape, or otherwise, and (c) have not been advanced in value or improved in condition abroad except by being assembled and except by operations incidental to the assembly process such as cleaning, lubricating, and painting [are subject to] [a] duty upon the full value of the imported article, less the cost or value of such products of the United States . . . .

Accordingly, domestic components exported for assembly and reshipped to the United States, which conform to the requirements of each subpart of item 807.00, are eligible for a trade allowance upon re-entry in an amount equal to their cost or value.

In this case, there is no question that the disputed sheet metal components were exported in condition ready for assembly without further fabrication (807.00(a)) and have not lost their physical identity in the finished motor vehicles (807.00(b)). Furthermore, the components have "been advanced in value or improved in condition abroad" by the painting operations performed in GM's Ramos Arizpe assembly plant, as contemplated by

807.00(c). Therefore, in determining whether the components qualify for the item 807.00 trade allowance, the dispositive issue is whether the painting operations fall within the scope of "operations incidental to the assembly process such as cleaning, lubricating, and painting."

GM suggests that this issue can be resolved solely by the plain language of the statute. It contends that item 807.00 "expressly enumerates painting as an acceptable operation incidental to assembly . . . [and] explicitly cover[s] the operation at issue here." We disagree. The statute's reference to "painting" is simply an exemplar of an operation which is potentially "incidental to the assembly process," not a definitive statement that all painting operations, no matter how extensive, are allowed under item 807.00(c). This interpretation is fully supported by the statute's legislative history, as set out in *United States v. Mast Indus. Inc.*, 668 F.2d 501, 505 (CCPA 1981):

> The amended item 807.00 would specifically permit the U.S. component to be advanced or improved "by operations incidental to the assembly process such as cleaning, lubricating, and painting." It is common practice in assembling mechanical components to perform certain incidental operations which cannot always be provided for in advance. For example, in fitting the parts of a machine together, it may be necessary . . . *to paint* or apply other preservative coatings. . . . *Such operations, if of a minor nature incidental to the assembly process*, whether done before, during, or after assembly, would be permitted even though they result in an advance in value of the U.S. components in the article assembled abroad.

H.R. Rep. No. 342, 89th Cong., 1st Sess. 49 (1965) (emphasis added). Thus, contrary to GM's suggestion, the mere fact that the disputed operations involve painting does not resolve this appeal. Instead, we must focus on whether the operations are "incidental to the assembly process" within the meaning of item 807.00(c).

Whether particular operations are "incidental to the assembly process" has been at issue before. *See, e.g., Mast*, 69 C.C.P.A. 47, 668 F.2d 501; *United States v. Oxford Indus., Inc.*, 69 C.C.P.A. 55, 668 F.2d 507 (CCPA 1981); *Miles v. United States*, 65 C.C.P.A. 32, 567 F.2d 979 (CCPA 1978). In *Mast*, the court had to determine whether buttonholing and pocket slitting operations performed upon fabric components were incidental to the assembly of women's pants under item 807.00(c). After rejecting arguments that these operations were precluded merely because they provided "independent utility" or were not essential to the assembly process, the court concluded that "operations [such] as applying preservative coatings and testing and adjusting the components are incidental to the assembly process '*if of a minor nature.*' " 668 F.2d at 506 (emphasis added); see also *Oxford*, 668 F.2d at 510. As a means of ascertaining whether "an operation of a 'minor nature' is incidental to the assembly process," the court set out the following factors:

> (1) Whether [i] the cost of the operation relative to the cost of the affected components and [ii] the time required by the operation relative to the time required for assembly of the whole article were such that the operation may be considered "minor." . . .
>
> (2) Whether the operations in question were necessary to the assembly process . . . .

> (3) Whether the operations were so related to assembly that they were logically performed during assembly.

Mast, 668 F.2d at 506. But because it identified these as "relevant factors in this case," *id.*, we do not read Mast as announcing factors that must invariably be used to the exclusion of all others, or that all such factors are pertinent in every case involving item 807.00. We believe "Congress intended a balancing of all relevant factors to ascertain whether an operation of a 'minor nature' is incidental to the assembly process." *Id.* We see this balancing process as an objective way to decide if particular operations are minor and incidental to assembly.

In applying the first part of the first *Mast* factor, the trial court said,

> The Mast court unambiguously stated that it compared the "cost of the [challenged] operation relative to the cost of the affected component and the time required by the operation relative to the time required for assembly of the whole article." 69 CCPA at 54, 668 F.2d at 506.
>
> With reference to what operations are "challenged", there is no doubt that all of the operations performed in the paint shop are *not* at issue herein. Customs itself noted in its rulings that the preservative coating operations that make up the rest of the paint shop operations were in conformity with the spirit of item 807.00. Therefore, for defendant to now demand the use of cost and time figures of *all* paint shop operations when performing *Mast* comparisons is irrational. Only the figures directly attributed to the challenged finish painting operations will render a truthful computation of whether the operation is indeed of a minor nature.

770 F. Supp. at 645. The court was correct that Customs allowed GM a trade allowance on components that underwent preservative coating operations, but this appeal involves different components, those which were also subjected to topcoat painting, on which a trade allowance was denied. Accordingly, we believe that all coating operations performed upon the disputed components, including zinc phosphate, electro deposition primer, sealant, surface primer, sanding, baking, and waxing operations, are relevant and must be considered in conjunction with topcoat painting operations to determine if coating operations, collectively, are minor incidents to assembly. The piecemeal analysis adopted by the trial court undermines item 807.00 by allowing major and significant operations to be broken down to a point where each step could be called minor. The court focused on its finding that "the cost of topcoating is but a fraction, *i.e.* 14%, of the cost of the affected components." *Id.* at 646. But the appropriate cost comparison, encompassing all paint shop operations and using GM's own cost data, reveals that coating operations are nothing if not major.

In applying the second part of the first *Mast* factor, the trial court observed that "the time expended in the topcoating operations accounts for less than four [standard labor hours] out of a total assembly time of over thirty-nine [standard labor hours]." *Id.* This time comparison, like the cost comparison, improperly excludes relevant coating operations. Nevertheless, while the comparison of labor hours, or total time of the operation, undoubtedly is relevant in some cases, where the operations are complex and involve significantly automated or non-labor processes (such as baking), this factor provides little guidance on whether operations are of a "minor nature." It is entitled to little weight in this case.

On the remaining *Mast* factors, the trial court held that "[GM] has painstakingly demonstrated that for reasons of economics as well as design, the topcoating operation is most logically performed during the assembly process." *Id.* We see nothing wrong with this finding, but it does not save the case for GM.

The record demonstrates that GM's cost data on coating operations is significantly understated because its accounting methods do not fairly allocate the cost of paint shop equipment to the cost of the paint shop operations. Under GM's accounting methods, depreciation costs are allocated to each department on the basis of the standard labor hours expended in the department, not on the basis of the actual capital investment. Accordingly, this does not fairly allocate the real costs of equipment, notwithstanding that "this method of reporting time and cost is a standardized method in cost accounting for assembly operations" and is "authorized by GAAP," according to GM.

We therefore believe capital investment in paint shop operations, compared with investment in the assembly processes, is relevant in deciding whether the operations at issue are of a minor nature. GM's data shows that the capital investment in machinery and equipment in the paint shop is more than five times that in the body shop, where significant assembly operations are performed. In sum, proper application of the first *Mast* factor, and consideration of overlooked information, confirms that the paint shop operations are not within the scope of item 807.00(c).

CONCLUSION

Accordingly, the judgment of the Court of International Trade is reversed.

COSTS

General Motors Corporation shall bear the costs of this appeal.

REVERSED

United States Court of Appeals
for the Federal Circuit

91-1518

GENERAL MOTORS CORPORATION,

Plaintiff-Appellee,

v.

THE UNITED STATES,

Defendant-Appellant.

DECIDED: October 8, 1992

Nies, *Chief Judge*, dissenting.

This case involves sheet metal components manufactured by General Motors in the United States and shipped to Mexico where they and numerous other components were assembled into automobiles. Upon re-entry of the automobiles into the United States, General Motors sought to subtract the value of the sheet metal components made in the United States from the full value of the automobiles in calculating the duty owed for importing the automobiles under item 807.00, TSUS (1986). Item 807.00 permits such a duty allowance for components made here which:

> (a) were exported in condition ready for assembly without further fabrication, (b) have not lost their physical identity . . . by change in form, shape, or otherwise, and (c) have not been advanced in value or improved in condition abroad except by

> being assembled and except by operations incidental to the assembly process such as cleaning, lubricating, and painting.

Item 807.00. The United States Customs Service denied allowances for sheet metal components which had been subject to topcoat painting operations in Mexico. The Court of International Trade disagreed and held that topcoating components in Mexico did not negate the deduction of the value of these parts as United States components. I agree.

The only question presented on appeal is whether the topcoated automobile components at issue have been advanced in value or improved in condition abroad by "operations incidental to the assembly process *such as cleaning, lubricating, and painting*." Item 807.00(c) (emphasis added). At the government's urging, the majority has looked to item 807.00's legislative history and the Court of Customs and Patent Appeals opinion in *United States v. Mast Indus.*, 69 C.C.P.A. 47, 668 F.2d 501 (CCPA 1981), to require that the painting operations in this case be *minor* in nature as well as "incidental to the assembly process."

Item 807.00(c) speaks of "operations incidental to the assembly process such as . . . painting." Looking to this seemingly unambiguous language, the proper inquiry in this case is whether the painting operations performed in Mexico were "incidental to the assembly process." While the majority opinion states that painting is merely listed as "an exemplar of an operation which is potentially 'incidental to the assembly process,'" item 807.00's specific mention of painting is at minimum a strong indication that the type of painting in issue is the exact type of activity 807.00 was amended to allow.

The government and the majority opinion look to our predecessor court's opinion in *Mast* as support for the requirement that the painting be "minor in nature." The operations in Mast were buttonholing and pocket slitting performed on fabric, operations not specifically mentioned in 807.00. The court looked to 807.00's legislative history in order to determine whether these operations were "incidental to the assembly process" under item 807.00(c). Such a resort to item 807.00's legislative history is not necessary in the present case—the plain language of item 807.00 governs the proper inquiry. *See United Stated v. Turkette*, 452 U.S. 576, 580, 69 L. Ed. 2d 246, 101 S. Ct. 2524 (1981).

In any event, to the extent that it is necessary to look to legislative history in order to further illuminate this seemingly clear provision, 807.00's legislative history explicitly names incidental painting as an operation which does not negate a duty allowance for imported components. In connection with amending 807.00 to allow the performance of certain value enhancing operations abroad, the legislative history states, "It appears that under the language of [pre-amendment] item 807.00 *minor operations such as painting incidental to assembly* abroad may be precluded, and that in certain respects the item is ambiguous, with the result that it imposes undue administrative burdens on customs officers." H.R. Rep. No. 342, 89th Cong., 1st Sess. 48 (1965) (emphasis added). Even assuming, *arguendo*, that an operation must be minor in nature to allow a duty allowance, 807.00's legislative history clearly implies, if not directly states, that painting which is incidental to assembly is inherently a minor operation.

If there is any doubt as to where the proper inquiry lies it is dispelled by close examination of the following factors used by the *Mast* court:[1] (1) whether the cost of the operation relative to the cost of the affected component and the time required by the operation relative to the time required for assembly of the whole article were such that the operation may be considered minor; (2) whether the operations were necessary to the assembly process; (3) whether the operations were so related to assembly that they were logically performed during assembly; and (4) whether economic or other practical considerations dictate that the operations be performed concurrently with assembly. 668 F.2d at 506 & n.7.

The first factor focuses solely on the extent of the operations, *i.e.*, whether the operations are "minor in nature," and forms the basis for the majority's opinion.[2] Concededly, an operation's being minor in nature clearly impacts upon its being "incidental to the assembly process." A very minor operation is likely to be incidental to the assembly process. This factor, however, does not stand alone as dispositive; it is to be combined with the other three *Mast* factors and any other relevant considerations

---

[1] It is interesting to note that, in addition to item 807.00's plain language and legislative history, the judicial interpretation of 807.00 in Mast speaks of painting as an operation allowable under 807.00(c). 668 F.2d at 505.

[2] In addition to the "cost of the operation" and the "time required by the operation" elements under the first Mast factor, the majority looked to the amount of General Motor's capital investment in the machinery and equipment in the paint shop. I fail to see how the purchase of expensive capital equipment for whatever reasons, i.e., to increase efficiency, to cut labor costs, or to reduce employee's exposure to unsafe working conditions, changes the nature of the operation.

in determining whether an operation fits within those allowed under 807.00(c). The remaining three factors in *Mast* focus on the relationship between the operation and the assembly process in order to determine to what extent the assembly process dictated that the operation be performed abroad with the assembly. I believe these three factors lie at the heart of the inquiry in the present case.

The government suggests that the sheet metal components could have been painted in the United States and assembled in Mexico by "a nut and bolt assembly". This suggestion is so ludicrous I would have held the appeal frivolous. The process of nut and bolt automotive assembly became obsolete in the 1950's with the advent of spot welding. General Motors has clearly established that the painting operations had to be performed during the assembly process in Mexico. The components could not be painted (either undercoated or topcoated) prior to shipment to Mexico because the parts were assembled through electrical welding and the non-conductive paint would have, therefore, prevented assembly. The components could not be undercoated after the complete car was assembled because all of the sheet metal components must be undercoated in order to prevent corrosion. Likewise, the sheet metal components could not be undercoated in Mexico and topcoated (a la Earl Schieb) after importation of the automobile because: (1) the windshields were attached by adhesives which bonded only to topcoat, (2) a delay in topcoating would increase ultra violet degradation of the undercoats, and (3) trim components would have to have been removed to paint all of the surfaces which need to be topcoated. The nature of the assembly process dictated that the painting opera-

tions be performed concurrently with the assembly of the car and, therefore, the painting operations conducted in Mexico were "incidental to the assembly process." Because of the denial of the deduction for these United States components, another part of the fabrication of automobiles in the United States will likely be lost. This cannot be the intent of Congress. Accordingly, I would affirm the judgment of the Court of International Trade.

[Dated July 23, 1991]

UNITED STATES COURT OF INTERNATIONAL TRADE

General Motors Corp.,	:	
plaintiff	:	
v.	:	Court No. 87-03-00471
United States,	:	
defendant.	:	

[Case submitted for trial and heard; judgment in favor of plaintiff.]

Ross & Hardies (*Joseph S. Kaplan* and *Michelle F. Forte*) for plaintiff.

Stuart M. Gerson, Assistant Attorney General; *Joseph I. Liebman*, Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Saul Davis*, Senior Trial Counsel; of counsel: *Stephen Berke*, Attorney, United States Customs Service, for defendant.

OPINION

Tsoucalas, Judge: Plaintiff, General Motors Corporation ("GM"), initiated this action to challenge denial of a protest seeking item 807.00, Tariff Schedules of the United States ("TSUS"), allowances for certain domestic automobile components exported for assembly. Plaintiff avers that Customs improperly withheld the tariff adjustments because all the item 807.00, TSUS, requirements were fulfilled.

Defendant maintains that GM's petition for item 807.00, TSUS, treatment was properly denied because, in the course of the painting process, the American made components were substantially advanced in value or improved in condition in a manner that was neither minor nor incidental to assembly. Defendant supports this position by noting that pertinent cost and time comparisons demonstrate that the painting operations constitute a substantial fraction of total cost and assembly time and cannot be deemed minor and the painting operations could have readily been performed upon re-entry in the United States and therefore can not be considered incidental to assembly.

The Court, after thorough examination of the applicable law, and having carefully considered the body of evidence put forth by the parties, finds that plaintiff has adequately established the eligibility of its products for preferential tariff treatment pursuant to item 807.00, TSUS. Hence, Customs is directed to reliquidate plaintiff's entries and grant item 807.00, TSUS, allowances for the components denied such treatment due to the contested painting operations.

BACKGROUND

The merchandise at issue consists of stamped sheet metal automobile components manufactured by GM in the United States and then exported to Mexico, between 1986 and 1987, for assembly into operable motor vehicles. Upon completion, the automobiles were reentered into the United States for ultimate sale wherein plaintiff sought a tariff allowance for the value of the exported components in accordance with item 807.00, TSUS. Al-

though some allowances were granted,[1] Customs denied allowances to all components that had undergone finish painting (pigmented topcoating) because "[f]inish painting vehicle parts is not of such a minor nature as to be considered incidental to the main assembly process" and "[i]f performed abroad, finish painting amounts to a fabrication that advances the vehicles in value and condition, beyond the meaning of [item 807.00]." *Treasury Ruling Letter* 553340 (*Joint exhibit* 2).

Plaintiff subsequently commenced the instant action to challenge Customs' denial of item 807.00, TSUS, allowances for components that underwent topcoating during the assembly process. Trial was commenced in August, 1990, before Chief Judge Re. Subsequent to trial, Chief Judge Re retired from the Court and this case was reassigned to Judge Tsoucalas.

Among the witnesses that testified at trial were Mr. Robert Stramy, manager of the Ramos Arizpe plant during the time at issue, testifying on plaintiff's behalf, and Mr. Steven Pinter, a Customs law specialist employed in the Office of Regulations and Rulings at Customs headquarters, who testified for defendant.

The evidence adduced at trial indicates that the prefabricated automobile components were transported to plaintiff's Ramos Arizpe plant via rail car, where they arrived immediately ready for manufacture into motor vehicles. *Transcript* ("TR") at 20-21. Assembly was performed in five general operation groups: body shop, paint

---

[1] The parties are in agreement that components that had undergone assembly and various other miscellaneous operations, but had not undergone finish painting operations, were granted item 807.00, TSUS, treatment.

shop, chassis line, trim shop and final process. *Plaintiff's Exhibit* ("Pl. Ex.") 3.

In the body shop, various major component subassemblies were fitted together and spot welded to create the carcass or body of the automobile. Mr. Stramy illustrated for the Court the complexity of the operations effected in the body shop, adding that this department not only contained the most complicated equipment but was also the most labor intensive. TR at 22-31. As explained by the witness, when the fitting and welding operations are completed, the partially assembled body travels via an overhead conveyor to the next operations group, the paint shop. TR at 31-32.

Upon arrival in the paint shop, the body is cleaned and sprayed with a protective zinc phosphate compound. Next, to further retard corrosion, the entire body is submerged in an electro deposition primer tank ("Elpo tank"), and then baked, sanded, treated with a sealant and baked again. TR at 32-33; Pl. Ex. 3B. This is followed by an application of surface primer. At this point topcoat application occurs and the body is oven cured. TR at 34. Finally the body is waxed and sent along to the trim shop. *Id.*

Once in the trim shop, the body undergoes all electrical wiring as well as the installation of the steering column, the gearshift lever and the instrument panel. Also installed while in the trim shop are the front and rear windshields, after which the body is inserted in the "water test booth" where intense rain conditions are simulated to detect any leakage problems. TR 34-36. After the water test booth, the carpets, seats, and moldings are positioned and the body is conveyed to the chassis shop.

The chassis shop is responsible for preparing the completed body for marriage to the engine and chassis frame. While the radiator, grille and gas tank are attached to the body, the engine, transmission, and frame are independently subassembled on a separate conveyor. Then the body and frame are joined. *Pl. Ex.* 3D; TR 36-37. Once this operation is completed, bumpers are positioned, radiator and transmission fluids are added and tires are installed before the vehicle is rolled to final process.

Final process is the last operations group in the assembly process. It consists mainly of manual detail work, sundry inspections, wheel alignments and drive tests. *Pl. Ex.* 3E. Once the vehicles have completed final process, they are driven to the shipping lot to await importation back to the United States.

At trial, plaintiff established that the total cost for the manufacture and assembly of one automobile was $7,127.42. *Pl. Exs.* 44, 45, 50, 51, and 52, collectively; *see also Plaintiff's Appendix C.* Of this sum, $763.47 is attributed to the cost of the affected components, i.e. (body-in-white), including freight charges and cost of assembly. *Pl. Ex.* 45, 48, 51, and *Defendant's Exhibit C*, collectively; *see also Plaintiff's Appendix B.* Moreover, plaintiff's records further indicated the total time expenditure for assembly of a vehicle is approximately 39.43 standard labor hours ("SLH"). *Pl. Ex.* 45. By way of contrast, the total time allocated to paint shop activities is 7.57 SLHs per assembled body, with only 3.63 SLHs devoted exclusively to topcoating operations. *Pl. Ex.* 46. Finally, total cost of paint shop operations is $113.70, $54.53 of which is attributed solely to topcoating. *Id.*; *see also Plaintiff's Appendix* A.

DISCUSSION

As is by now well established, Customs' classifications are presumed to be correct. 28 U.S.C. § 2639(a)(1) (1982). Therefore, in order to prevail, the party challenging said decision must overcome this presumption of correctness and affirmatively prove proper classification. *Id.*; *Brookside Veneers, Ltd. v. United States*, 847 F.2d 786, 787 (Fed. Cir.), *cert. denied*, 109 S. Ct. 369 (1988). The same criterion applies for tariff allowance eligibility claims.

American goods that are exported solely for the purpose of assembly are afforded special duty allowances under the TSUS. Item 807.00, TSUS (1986), provides:

> Articles assembled abroad in whole or in part of fabricated components, the product of the United States, which (a) were exported in condition ready for assembly without further fabrication, (b) have not lost their physical identity in such articles by change in form, shape, or otherwise, and (c) have not been advanced in value or improved in condition abroad except by being assembled and except by operations incidental to the assembly process such as cleaning, lubricating, and painting

shall be dutiable at the full value of the imported article, minus the cost of such products of United States origin. Thus, in order to qualify for item 807.00, TSUS, allowances, a party must satisfy each of the aforementioned conditions. *Samsonite Corp. v. United States*, 12 CIT 1146, 1147, 702 F. Supp. 908, 909 (1988), aff'd, 889 F.2d 1074 (Fed. Cir. 1989); *Proctor & Gamble Distrib. Co. v. United States*, 11 CIT 450, 451 (1987).

In the instant action, defendant concedes that plaintiff's components were ready for assembly as exported (item 807.00 (a)), and have not lost their physical iden-

tity within the finished product (item 807.00(b)). The Court's analysis, therefore, is limited to whether the components have been advanced in value or improved in condition except by assembly and operations incidental thereto (item 807.00(c)). More precisely, the controversy centers around whether certain painting operations effectuated during the assembly process should be deemed permissible as "incidental to assembly."

The question of what can be deemed "incidental to assembly" is not new to our court. Indeed, the court has had ample occasion to, and taken great care in, delineating the range of operations to be regarded "incidental to assembly." *See, e.g., United States v. Mast Indus., Inc.*, 69 CCPA 47, 668 F.2d 501 (1981); *United States v. Oxford Indus., Inc.*, 69 CCPA 55, 668 F.2d 507 (1981); *Miles v. United States*, 65 CCPA 32, C.A.D. 1202, 567 F.2d 979 (1978); *E. Dillingham, Inc. v. United States*, 60 CCPA 39, C.A.D. 1078, 470 F.2d 629 (1972); *Samsonite*, 12 CIT 1146, 702 F. Supp. 908; *L'eggs Prods., Inc. v. United States*, 13 CIT 40, 704 F. Supp. 1127 (1989); *Surgikos, Inc. v. United States*, 12 CIT 242 (1988); *Zwicker Knitting Mills v. United States*, 82 Cust. Ct. 34, 469 F. Supp. 727 (1979), *aff'd*, 67 CCPA 37, 613 F.2d 295 (1980); *Baylis Bros. Co. v. United States*, 64 Cust. Ct. 256, C.D. 3987 (1970), *aff'd*, 59 CCPA 9, C.A.D. 1026, 451 F.2d 643 (1971).

In these instances, the court often has referred to the legislative history of item 807.00, TSUS, for assistance in determining what "Congress intended to be considered 'incidental to the assembly process.' " *Zwicker*, 82 Cust. Ct. at 47, 469 F. Supp. at 736; *accord*, *Mast*, 69 CCPA at 53, 668 F.2d at 505; *Oxford*, 69 CCPA at 60, 668 F.2d at 510. In so doing, it has construed Congress' objective to

"permit duty-free treatment of a component manufactured in the United States if subjected to an operation 'of a minor nature.' " *Id.*

Specifically, the legislative history of item 807.00, TSUS, chronicles modifications made to the allowance provision and explains the reasons for the changes. "It appears that under the language of item 807.00 minor operations such as painting incidental to assembly abroad may be precluded, and that in certain respects the item is ambiguous." H.R. Rep. No. 342, 89th Cong., 1st Sess. 48.

In a further attempt to "facilitate interpretation and to remove doubt as to the operations that were deemed 'incidental to the assembly process,' " Congress provided as "specific examples operations 'such as *cleaning, lubricating*, and *painting*'." *Zwicker*, 82 Cust. Ct. at 48, 469 F. Supp. at 737 (emphasis in original). These miscellaneous operations, Congress recognized, albeit not part of the assembly process, are often inextricably related to it.

> It is common practice in assembling mechanical components to perform certain incidental operations which cannot always be provided for in advance. For example, in fitting the parts of a machine together, it may be necessary to remove rust; to remove grease, *paint*, or other preservative coatings; to file off or otherwise remove small amounts of excess material; to add lubricants; or to paint or apply other preservative coatings. * * * Such operations, if of a minor nature incidental to the assembly process, whether done before, during, or after assembly, would be permitted even though they result in an advance in value of the U.S. components in the article assembled abroad.

H.R. Rep. No. 342, 89th Cong., 1st Sess. 49 (emphasis added).

The Senate Finance Committee elaborated further with reference to their purpose in effecting the proposed changes. The Committee noted that the bill was intended to "(1) clarif[y] the type of articles which may be exported for assembly and then reimported; and (2) *enlarge[ ] the class of activities which may be performed abroad* without subjecting the U.S. product to duty." S. Rep. No. 530, 89th Cong., 1st Sess. 34, *reprinted in*, 1965 U.S. Code Cong. Admin. News 3449 (emphasis added).

In *Zwicker*, the court considered the examples provided by Congress in determining that the operation at issue therein, the fingertipping of knit glove shells, was "clearly not *ejusdem generis* with 'cleaning, lubricating, and painting.' " 82 Cust. Ct. at 48, 469 F. Supp. at 737. The court went on to explain that the fingertipping operations could not be considered minor because they constituted "a critical step prior to assembly" without which further assembly could not occur. Id. (emphasis added).

By contrast, the operation at issue herein is clearly ejusdem generis with Congress' examples. Indeed, it is *eo nomine* one of those examples. Moreover, unlike the fingertipping operations involved in *Zwicker*, which were a prerequisite to assembly completion, the painting operation at issue here is not critical to complete the assembly of the affected components. This is best evidenced by the fact that the affected components are already assembled before they undergo the painting operations.

In two later cases, *Mast* and *Oxford*, our appellate court was required to determine whether certain buttonholing and pocketsplitting operations performed during

assembly were properly deemed "incidental to assembly." 69 CCPA 47, 668 F.2d 501; 69 CCPA 55, 668 F.2d 507. Here again the court had to extrapolate whether the challenged operations were of the sort Congress considered of a minor nature and incidental to assembly. While contemplating Congress' examples of permissible operations, the court noted that "the statute sets forth painting of a component as an example of permissible operations incidental to assembly. It is difficult to visualize a situation where the sole purpose of painting would be to facilitate assembly, or even where painting would be essential to the assembly process." *Mast*, 69 CCPA at 53, 668 F.2d at 505.

The court in *Mast* and *Oxford* went on to specify various relevant factors which should be considered to determine whether the challenged operations were "incidental to assembly" and minor in nature. Among the factors examined were: (a) whether the cost of the challenged operation was substantial relative to the cost of the affected components, (b) whether the time required to perform the challenged operation was significant relative to the time required for assembly of the entire article, and (c) whether the operation was so related to the assembly process that it would "logically [be] performed during assembly." *Mast*, 69 CCPA at 54, 668 F.2d at 506; *accord*, *Oxford*, 69 CCPA at 60, 668 F.2d at 511.

While defendant acknowledges that the standards enunciated in *Mast* are squarely applicable here, it maintains that the relevant comparison should be between the cost and time expenditure of the *entire* paint shop operations versus the cost and time expenditure of the affected components. This suggestion implies either an erroneous interpretation of the guidelines set forth in

Mast, or a misunderstanding of the challenged operations. The *Mast* court unambiguously stated that it compared the "cost of the [challenged] operation relative to the cost of the affected component and the time required by the operation relative to the time required for assembly of the whole article." 69 CCPA at 54, 668 F.2d at 506.

With reference to what operations are "challenged", there is no doubt that all of the operations performed in the paint shop are not at issue herein. Customs itself noted in its rulings that the preservative coating operations that make up the rest of the paint shop operations were in conformity with the spirit of item 807.00. Therefore, for defendant to now demand the use of cost and time figures of *all* paint shop operations when performing *Mast* comparisons is irrational. Only the figures directly attributed to the challenged finish painting operations will render a truthful computation of whether the operation is indeed of a minor nature.

Applying the *Mast* criteria to the case at bar, the Court finds that the cost of topcoating is but a fraction, *i.e.* 14%, of the cost of the affected components. In addition, the time expended in the topcoating operations accounts for less than four SLHs out of a total assembly time of over thirty-nine SLHs. Finally, with respect to the "logical relation to assembly" standard, plaintiff has painstakingly demonstrated that for reasons of economics as well as design, the topcoating operation is most logically performed during the assembly process. *See Plaintiff's Post Trial Brief* at 8-14. Hence, it would appear upon execution of the appropriate cost and assembly time comparisons, which our appellate court has sustained time and again, that the topcoating operation challenged herein is precisely the type of minor operation which Congress intended to be considered "incidental to assembly."

Customs, nevertheless, urges that total body finish painting is not encompassed by item 807.00(c). Instead, defendant maintains, the term "painting" in item 807.00(c) is limited to only protective coatings and slight repair painting. In support of this position, Customs points to a longstanding agency practice embodied in its regulations and reminds the Court that great deference should be afforded to the statutory interpretation adopted by the administering agency.

The regulation Customs refers to is 19 C.F.R. § 10.16 (1986) which states:

> (c) Operations not incidental to the assembly process. Any significant process, operation, or treatment other than assembly whose primary purpose is the fabrication, completion, physical or chemical improvement of a component, or which is not related to the assembly process, whether or not it effects a substantial transformation of the article, shall not be regarded as incidental to the assembly and shall preclude the application of the exemption to such article. The following are examples of operations not considered incidental to the assembly as provided under item 807.00, Tariff Schedules of the United States (19 U.S.C. 1202):
>
> (1) Melting of exported ingots and pouring of the metal into molds to produce cast metal parts;
>
> (2) Cutting of garment parts according to pattern from exported materials;
>
> (3) Painting primarily intended to enhance the appearance of an article or to impart distinctive features or characteristics;
>
> (4) Chemical treatment of components or assembled articles to impart new characteristics, such

as showerproofing, permapressing, sanforizing, dying or bleaching of textiles;

(5) Machining, polishing, burnishing, peening, plating (other than plating incidental to the assembly), embossing, pressing, stamping, extruding, drawing, annealing, tempering, case hardening, and any other operation, treatment or process which imparts significant new characteristics or qualities to the article affected.

Defendant apparently operates under the impression that Congress intended the term "paint," as used in the examples to item 807.00, TSUS, to mean exclusively "preservative paint or coating, including preservative metallic coating, lubricants, or protective encapsulation." 19 C.F.R. § 10.16(b)(3). However, defendant's only support for this contention is found in its own regulation and the testimony of Mr. Pinter who was involved in the drafting of 19 C.F.R. § 10.16. In light of the significant authority refuting defendant's position, such scant evidence will not suffice.

It is a general rule that statutory terms are presumed to have their common or dictionary meanings. *Brookside*, 847 F.2d at 789. Accordingly, one who argues otherwise must prove that something other than the common or dictionary meaning was intended. Id., (citing *Rohm & Haas Co. v. United States*, 727 F.2d 1095, 1097 (Fed. Cir. 1984)).

Dictionaries and other lexicons are proper sources for the court to consult when determining a term's common or commercial meaning. *Austin Chem. Co., Inc. v. United States*, 835 F.2d 1423, 1426 (1987). Paint is defined in *Van Nostrand's Scientific Encyclopedia* 2117 (7th ed. 1989) as a

> term[ ] used to describe a wide variety of materials designed to adhere to a substrate and act as a thin, plasticlike layer. Paints are available for decorative, protective and other purposes. They can be decorative by covering defects (being opaque), by changing color, or by providing a desired gloss or sheen. Protective uses include shielding metals from corrosion, protecting plastics from degradation caused by ultraviolet light, acting as a moisture barrier and providing mar and scratch resistance for wood or plastic surfaces.

Other lexicographic sources characterize paint as a "substance consisting of a solid colouring matter dissolved in a liquid vehicle, as water or oil, used to impart a colour by being spread over a surface; also applied to the solid colouring matter alone," *The Oxford English Dictionary* 69 (2d ed. 1989), and as a "mixture of a pigment and a suitable vehicle (as oil, water) that together form a liquid or paste that can be applied and spread (as with a brush, spray gun, roller) to a surface so as to form a thin closely adherent coating that dries opaque and imparts color to the surface and that is often designed to protect the surface (as against weathering)." *Webster's Third New International Dictionary* 1621 (1981).

Defendant has not offered, nor has the Court found, anything in the statutory provision, the legislative history, or the various lexicons, to support the premise that Congress intended to restrict the meaning of the term paint. In fact, all definitions of the term, while acknowledging the protective qualities of paint, underscore the aspects relating to pigmentation. Moreover, all the sources consulted noted that all paint, regardless of pigmentation, by its very nature functions as a protective

coating. Given the ultimate use of the merchandise in this case, the Court has no doubt that the protective qualities of the topcoating operation are significant.

Under these circumstances, the Court is not inclined to infer words of limitation where Congress has so specifically omitted them and has in addition expressed an intent that the provision serve to "enlarge[ ] the class of activities which may be performed abroad" without precluding item 807.00 eligibility. S. Rep. No. 530, 89th Cong., 1st Sess. 34, *reprinted in*, 1965 U.S. Code Cong. & Admin. News 3449.

Finally, with respect to the longstanding administrative practice, the Court is well aware and need not be reminded that the administrative agency is often better equipped to interpret nuances in the statutes they are charged with administering. Accordingly, implementing regulations are consulted when the court seeks to construe ambiguous statutes. This notwithstanding, it is fundamental that longstanding administrative practice, if contrary to the plain and unambiguous meaning of the statute, will not attain legal propriety simply because it has been revered. *C.J. Tower & Sons v. United States*, 44 CCPA 40, 44 (1957). Indeed, "it is axiomatic that when a tariff statute [is] construed by the court, it is the judicial decision and not the administrative practice which is controlling." *L'eggs Prods.*, 13 CIT at 49, 704 F. Supp. at 1133. Therefore, while the agency's understanding of statutory intent is often a valuable source of insight for the court to draw upon, it cannot be mechanically equated with legislative intent or, for that matter, be deemed automatically binding on this Court.

Hence, the Court finds plaintiff has met the burden of proving eligibility of its products to item 807.00 treat-

ment. The finish painting operations performed abroad are, by the criteria established by caselaw, minor and clearly subordinate to the assembly process. Moreover, any advancement in value or improvement in condition of the components clearly results from an operation which is "incidental to assembly." Therefore, the Court finds that since all the prerequisites for item 807.00, TSUS, treatment of the components at issue have been fulfilled, plaintiff's entries qualify for the tariff allowances.

Nicholas Tsoucalas
JUDGE

Dated: New York, New York
This 23rd day of July, 1991.

No. 95-2058

Supreme Court, U.S.
FILED
JUL 19 1996
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

CHRYSLER CORPORATION,

Petitioner,

v.

THE UNITED STATES,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

---

BRIEF AMICUS CURIAE OF AMERICAN APPAREL MANUFACTURERS ASSOCIATION, AMERICAN ASSOCIATION OF EXPORTERS AND IMPORTERS, AMERICAN IRON AND STEEL INSTITUTE, AND UNITED STATES ASSOCIATION OF IMPORTERS OF TEXTILES AND APPAREL IN SUPPORT OF PETITIONER

FREDERICK L. IKENSON
Counsel of Record
FREDERICK L. IKENSON, P.C.
1621 New Hampshire Avenue, N.W.
Washington, D.C. 20009
Telephone: (202) 483-8900

PRESS OF BYRON S. ADAMS ✦ WASHINGTON, D.C. ✦ 1-800-347-8208

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES CITED ii

INTEREST OF AMICI CURIAE 1

SUMMARY OF ARGUMENT 3

ARGUMENT 4

THE DECISION BELOW WRONGLY AND MATERIALLY WEAKENS A STATUTORY PROGRAM OF SIGNIFICANT ECONOMIC IMPORTANCE 4

1. Background 4

2. The Decision Below Is Aberrational And Mischievous: By Failing To Require A Balancing Of Traditional Factors, The Court Of Appeals Has Opened The Door To Frustrating The Congressional Will; By Focusing Exclusively On Cost, And Especially Capital Cost, It Has Unsettled That Which Had Never Been Nor Should Ever Have Been In Doubt. 12

CONCLUSION 19

TABLE OF AUTHORITIES CITED

PAGE

CASES:

Chrysler Corp. v. United States, No. 95-1366 (Fed. Cir., Mar. 22, 1996) (Fed. Cir. BBS) . . . 5, 15

Chrysler Corp. v. United States, Slip Op. 95-39 (Ct. Int'l Trade Mar. 14, 1995) 15, 19

General Instrument Corp. v. United States, 462 F.2d 1156 (CCPA 1972) 9

General Instrument Corp. v. United States, 480 F.2d 1402 (CCPA 1973) 9

General Instrument Corp. v. United States, 499 F.2d 1318 (CCPA 1974) 10

General Motors Corp. v. United States, 770 F. Supp. 641 (Ct. Int'l Trade 1991), rev'd, 976 F.2d 716 (Fed. Cir. 1992) 12

General Motors Corp. v. United States, 976 F.2d 716 (Fed. Cir. 1992) . . . . . passim

Rudolph Miles v. United States, 567 F.2d 979 (CCPA 1978) 10

United States v. Mast Industries, Inc., 668 F.2d 501 (CCPA 1981) . . . . . passim

United States v. Oxford Industries, Inc., 668 F.2d 507 (CCPA 1981) 11, 13, 16-17

TABLE OF AUTHORITIES CITED (Cont'd)

PAGE

CASES (Cont'd):

United States v. Texas Instruments, Inc., 545 F.2d 739 (CCPA 1976) 10

STATUTES:

19 U.S.C. § 1202, Harmonized Tariff Schedule of the United States, Subheading 9802.00.80 . passim

19 U.S.C. § 1202, Tariff Schedules of the United States, Item 807.00 . . . . . passim

Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, § 1204(a), 102 Stat. 1107, 1148 5

REGULATIONS:

19 C.F.R. § 10.16(b) (1995) 11, 18

19 C.F.R. § 10.16(c) (1995) 11

OTHER:

Committee on Finance, U.S. Senate, Summary of Minor House-Passed Bills Pending Before the Committee on Finance (1966) 8

H.R. Rep. No. 342, 89th Cong., 1st Sess. 49 (1965) 8-9

TABLE OF AUTHORITIES CITED (Cont'd)

PAGE

OTHER (Cont'd):

Rule 37.2(a), Rules of the Supreme Court of the United States 1

S. Rep. No. 530, 89th Cong., 1st Sess. 34 (1965) . . . 6

U.S. International Trade Commission, Production Sharing: U.S. Imports Under Harmonized Tariff Schedule Subheadings 9802.00.60 And 9802.00.80, 1986-1989 -- Summary Report, USITC Pub. 2349 (Jan. 1991) 6, 8

U.S. International Trade Commission, Production Sharing: Use Of U.S. Components And Materials In Foreign Assembly Operations, 1990-1993, USITC Pub. 2886 (May 1995) . . 2, 5

U.S. Tariff Commission, Economic Factors Affecting The Use Of Items 807.00 and 806.30 Of The Tariff Schedules Of The United States, TC Pub. 339 (Sept. 1970) 6

U.S. Tariff Commission, Tariff Classification Study, Explanatory and Background Materials; Schedule 8. -- Special Classification Provisions, Appendix to the Tariff Schedules (Nov. 15, 1960) 6

INTEREST OF AMICI CURIAE

Pursuant to Rule 37.2(a) of the Rules of this Court, the American Apparel Manufacturers Association ("AAMA"), the American Association of Exporters and Importers ("AAEI"), the American Iron and Steel Institute ("AISI"), and the United States Association of Importers of Textiles and Apparel ("USA-ITA") (collectively, "the Associations" or "amici"), with the written consent of all parties,[1] respectfully submit this brief amicus curiae in support of the petition by Chrysler Corporation ("Chrysler") for a writ of certiorari to the United States Court of Appeals for the Federal Circuit ("Federal Circuit").

This case involves the proper interpretation of a tariff provision -- subheading 9802.00.80 of the Harmonized Tariff Schedule of The United States ("HTS"), 19 U.S.C. § 1202 -- which provides reduced-duty treatment for eligible imported goods assembled abroad from parts and components fabricated in the United States. If the conditions of 9802.00.80 are satisfied, the dutiable value of the imported article is reduced by the value of the U.S.-made components.

The provision was designed to promote the use of U.S. products as inputs in goods assembled abroad. U.S. manufacturers that engage in production sharing rely upon the provision to benefit from lower-cost assembly labor in order to better compete with labor-intensive articles produced by foreign manufacturers from foreign parts.

The Associations are trade groups whose members are substantially involved in international trade activities in

---

[1] All parties have consented to the filing of this brief and letters of consent have been lodged with the Clerk of this Court.

general and in activities concerning imports under the provisions of subheading 9802.00.80 in particular. It is the view of the Associations that their respective members stand to be directly and substantially affected by the Court's decision on this matter.[2] If the Federal Circuit's unduly restrictive interpretation of "operations incidental to the assembly process" is permitted to stand, the effects will be severely adverse and detrimental to the collective and

---

[2] Amici are trade associations whose members, collectively, are involved in trade in those products which account for the overwhelming majority of current and historical traffic under subheading 9802.00.80, HTS, or have a direct interest in such trade as materials suppliers. AAEI has over 1,000 members engaged in international trade in virtually every industry segment; many such members utilize a subheading 9802.00.80 program. The AAMA's members account for the production of about two-thirds of apparel manufactured in the United States, and the USA-ITA's members account for a substantial number of importers and retailers of wearing apparel. The members of these textile groups are also substantial utilizers of 9802.00.80; indeed, textiles is one of the principal products to make use of that duty exemption provision (with over $5 billion in U.S. imports for consumption under subheading 9802.00.80 in 1993). U.S. International Trade Commission, Production Sharing: Use Of U.S. Components And Materials In Foreign Assembly Operations, 1990-1993, USITC Pub. 2886 at B-24 (May 1995). Finally, as suppliers of 75 percent of the raw steel produced in the United States, the U.S. members of AISI are integrally involved in the automotive and numerous other heavy industries -- 1993 motor vehicle imports under 9802.00.80 exceeded $25 billion and all 9802.00.80 imports in the machinery and equipment commodity group topped $46.8 billion. Id. at B-26, B-27. The Associations include literally thousands of domestic manufacturers of materials, components and finished goods, and the importers and exporters of such articles, produced through the practices that the provisions of subheading 9802.00.80 are designed to accommodate and influence to the benefit of the domestic work force.

individual competitive positions of the Associations' members.

SUMMARY OF ARGUMENT

At issue in this case are very specific tariff provisions, the demonstrable purpose of which is to provide clear economic benefit to U.S. manufacturers of parts and components which are used abroad to assemble articles subsequently imported into the United States. Such benefits are intended to encourage the use of U.S. products as inputs in goods produced abroad by low-cost assembly labor, so as to preserve and promote higher skilled and more sophisticated domestic manufacturing.

The legislative history and judicial interpretations of these provisions, development of which has spanned decades, define a clear progression toward ease of access to these tariff benefits through steady removal of impediments at odds with the legislative purpose. Moreover, through case law, there had evolved a clear analytical framework, grounded upon the rational balancing of a number of factors relevant to whether an operation is incidental to assembly, within which issues pertaining to the satisfaction of the statutory condition of incidentality could be reliably, fairly and predictably resolved.

In 1992, a divided panel of the Federal Circuit rendered a decision that unexpectedly reversed a lower court's approval of the reduced-duty benefits, which approval had resulted from a sound application of and reliance upon the established evaluative criteria. The case for which certiorari now is sought affords this Court its first opportunity to review the Federal Circuit's current rationale, which represents an extreme and harmful divergence from prior

law. By requiring a determination that an operation be a minor one as a sine qua non of incidentality, and by further unduly emphasizing the single element of cost as determinative of the minor nature of an operation to the exclusion of other pertinent criteria, the Federal Circuit unjustifiably has dispensed with balancing altogether. Finally, by introducing an evaluation of investment in capital equipment, which cost is not relevant, the Federal Circuit's rationale renders the entire incidentality inquiry unsound.

This aspect of the law now has been cast into uncertainty and controversy, even with respect to matters previously long settled. The Federal Circuit's approach stands to adversely affect the economic interests of U.S. labor and the domestic industrial base, and risks direct frustration of the clear congressional intent to aid such parties, including amici's members, in an orderly and beneficial participation in production sharing.

ARGUMENT

THE DECISION BELOW WRONGLY AND MATERIALLY WEAKENS A STATUTORY PROGRAM OF SIGNIFICANT ECONOMIC IMPORTANCE

1. Background

Over the last three decades, the U.S. economy has become increasingly integrated with that of the rest of the world, and U.S. manufacturers, in the face of global economic realities, increasingly have turned toward international production sharing in order to maintain competitiveness. In the course of this evolution toward global integration, the provisions of subheading 9802.00.80,

HTS, and its predecessor provisions,[3] have served U.S. firms well, enabling them to vastly improve the price competitiveness of their products by shifting labor-intensive assembly operations to lower labor cost countries, to reduce the cost of cross-border transfers of both component parts and finished goods, and to rationalize production by consolidating the manufacture of particular components and products in specialized facilities, both foreign and domestic, so as to achieve greater efficiency and economies of scale.[4]

It is well documented that the purpose of the duty-saving provisions of subheading 9802.00.80 is to nurture U.S. interests and promote U.S. employment in manufacturing sectors, while accommodating the inevitable (and efficient) transfer of lesser-skilled assembly work to lower-wage areas offshore. Over a quarter century ago, the (then) U.S. Tariff Commission concluded that a repeal of item 807.00, TSUS, likely would result in a net loss of skilled domestic manufacturing positions because continuing imports

---

[3] Prior to implementation of the HTS (effective January 1, 1989), the substantive provisions of subheading 9802.00.80, HTS, were embodied in item 807.00 of the Tariff Schedules of the United States ("TSUS"), 19 U.S.C. § 1202 (the TSUS provisions were stricken by Pub. L. No. 100-418, § 1204(a), 102 Stat. 1107, 1148 (1988). and replaced by the HTS). As noted by the Federal Circuit in the decision below, Chrysler Corp. v. United States, No. 95-1366 at *3 (Fed. Cir., Mar. 22, 1996) (Fed. Cir. BBS), Petition Appendix ("App.") 1-6, App. 5, there are no relevant differences between subheading 9802.00.80, HTS, and item 807.00, TSUS, the tariff provision interpreted in General Motors Corp. v. United States, 976 F.2d 716 (Fed. Cir. 1992), App. 16-31.

[4] See Production Sharing . . . 1990-1993, supra, USITC Pub. 2886 at 1-1 & n.4.

would contain fewer U.S.-produced components as inputs, and that, absent the available duty exemptions, both the balance of trade and domestic employment could be expected to be adversely affected. U.S. Tariff Commission, Economic Factors Affecting The Use Of Items 807.00 and 806.30 Of The Tariff Schedules Of The United States, TC Pub. 339 at 230-33 (Sept. 1970).

So as to encourage the continued use of U.S.-produced inputs in imported articles and to maintain the usefulness of these statutory provisions to firms engaged in domestic and foreign production sharing, Congress repeatedly has amended the provisions of item 807.00/subheading 9802.00.80. The provision of 9802.00.80 at issue here (i.e., that which permits "operations incidental to the assembly process such as cleaning, lubricating and painting") was added in 1965, when the original provisions of item 807.00 were amended to "(1) clarif[y] the type of articles which may be exported for assembly and then reimported; and (2) enlarge[] the class of activities which may be performed abroad without subjecting the U.S. product to duty." S. Rep. No. 530, 89th Cong., 1st Sess. 34 (1965) (emphasis added).[5]

---

[5] As originally enacted in 1963, item 807.00 applied only to U.S. articles exported for assembly "which have not been advanced in value or improved in condition by any means other than by the act of assembly." As explained in a thorough discussion of the legislative history of item 807.00, see generally U.S. International Trade Commission, Production Sharing: U.S. Imports Under Harmonized Tariff Schedule Subheadings 9802.00.60 And 9802.00.80, 1986-1989 -- Summary Report, USITC Pub. 2349 at A-10 to A-12 (Jan. 1991), the original provisions limited the allowable extent of advancement or improvement of the U.S. goods to that which was brought about solely by the act of assembly. See also U.S. Tariff Commission, Tariff

(continued...)

An important part of the legislative enlargement of permissible activities was the express provision for "operations incidental to the assembly process such as cleaning, lubricating and painting." The accompanying House Report explained that:

> It is common practice in assembling mechanical components to perform certain incidental operations which cannot always be provided for in advance. For example, in fitting the parts of a machine together, it may be necessary to remove rust; to remove grease, paint, or other preservative coatings; to file off or otherwise remove small amounts of excess material; to add lubricants; or to paint or apply other preservative coatings. It may also be necessary to test and adjust the components. Such operations, if of a minor nature incidental to the assembly process, whether done before, during, or after assembly, would be permitted even though they result in an advance in value of the U.S. components in the article assembled abroad.

---

[5](...continued)

Classification Study, Explanatory and Background Materials: Schedule 8. -- Special Classification Provisions, Appendix to the Tariff Schedules at 15 (Nov. 15, 1960) (this same restriction appeared in explanatory notes regarding the provisions of item 807.00 as originally proposed). It should be kept in mind, of course, that, under item 807.00/subheading 9802.00.80, it is only the value of the U.S. component, as it is exported from the United States, that is excluded from the dutiable value of the finished article.

H.R. Rep. No. 342, 89th Cong., 1st Sess. 49 (1965). The passing reference in this quotation to operations "of a minor nature," which did not find its way into the statute, is the sole underpinning of the Federal Circuit's rationale at issue here. Moreover, when item 807.00 was again amended, by the same Congress sitting in second session, there was no suggestion that the incidental operations specifically approved by statute were limited by any ambiguous notions regarding the "minor nature" of such operations:

> In the Tariff Schedules Technical Amendments Act of 1965 item 807.00 was clarified to make it clear that cleaning, lubricating, and painting could be performed in connection with the assembly function without subjecting the U.S. components to duty on their return to this country.

Committee on Finance, U.S. Senate, Summary of Minor House-Passed Bills Pending Before the Committee on Finance (1966) at 14, quoted in Production Sharing . . . 1986-1989 -- Summary Report, supra, USITC Pub. 2349 at A-11 to A-12. Furthermore, an "additional restrictive clause" that had been added in 1965 (requiring that there be an intention, at the time of exportation of the U.S. component, to ship the assembled article to the United States) was deleted from item 807.00 in 1966 (see USITC Pub. 2349 at A-11), thereby further promoting the legislative purpose that the duty exemption encourage the use of U.S. goods in foreign assembly operations.

Notwithstanding the clear intent of Congress that these provisions operate to engage and actively assist U.S. parts and components producers in global production sharing, the U.S. Customs Service ("Customs"), steeped in

its traditional role of protecting the revenue, consistently adopted unduly restrictive interpretations of item 807.00 that limited the utility of the provisions. Over the years, reviewing courts regularly and repeatedly had to prod Customs into conformity with the legislative mandate to provide industry with these reduced-duty benefits.

Throughout the 1970s, controversies arose requiring the courts to provide incremental guidance countering Customs' reluctance to extend item 807.00 application to any operation not explicitly encompassed by statute. For example, while the statute provided for cleaning, lubricating and painting (and, clearly, it was permissible "to file off or otherwise remove small amounts of excess material," H.R. Rep. No. 342, supra, at 49), Customs denied item 807.00 benefits where operations involved the cutting of materials. On review, the U.S. Court of Customs and Patent Appeals ("CCPA") -- one of the predecessors to the Federal Circuit -- applied standards of practicality that tempered the agency's conservative and mechanistic approach, and ruled that cutting materials to length did not foreclose use of item 807.00. See General Instrument Corp. v. United States, 462 F.2d 1156 (CCPA 1972) (item 807.00 treatment approved for U.S. wire, exported on spools and used in assembly of transistors, notwithstanding that such wire was cut to length after attachment of the free end to the transistor being assembled). Customs then refused to extend that teaching to encompass materials cut to length and width, but the CCPA required precisely that. General Instrument Corp. v. United States, 480 F.2d 1402 (CCPA 1973) (cutting foil, paper, tape and film to proper length, and the further cutting to width and trimming of the foil, all found to be permissible operations incidental to assembly of a capacitor). Thus required to accept cutting operations, Customs nevertheless balked at various shaping procedures and similar operations; in

response, the court of appeals led Customs, one operation at a time, through an ever more expansive understanding as to the activities permitted under item 807.00. See General Instrument Corp. v. United States, 499 F.2d 1318 (CCPA 1974) (extending item 807.00 treatment to television deflection yokes assembled from U.S. wire that was despooled, formed into a horizontal coil, cement-dipped, dried and shaped, other wire despooled and wound about a core to form a vertical coil, and wire despooled, cut, stripped of insulation and woven into a harness); see also United States v. Texas Instruments, Inc., 545 F.2d 739 (CCPA 1976) (affirming a lower court's decision that the scribing and breaking of silicon slices along predefined "streets" (so as to separate thousands of transistor chips formed on each slice) was a permissible operation in conjunction with the assembly of the individual chips into complete, encapsulated transistors). Moreover, such concepts were held to apply without regard to the scale of the components involved. See Rudolph Miles v. United States, 567 F.2d 979 (CCPA 1978) (cutting of holes and slots in steel "Z-beams" was found permissible in the construction of railroad boxcars).

Then, in 1981, the court of appeals advanced item 807.00 jurisprudence beyond this cumbersome case-by-case and operation-by-operation approach to overruling challenges raised by Customs. In affirming the U.S. Court of International Trade's decision that Customs erroneously had denied item 807.00 treatment on the basis of pocket slitting and buttonholing operations found to be incidental to the assembly of wearing apparel, the appellate court articulated definitive analytical criteria pertinent to any evaluation of incidentality. In United States v. Mast Industries, Inc., 668 F.2d 501 (CCPA 1981), the court concluded that "Congress intended a balancing of all relevant factors to ascertain

whether an operation of a 'minor nature' is incidental to the assembly process" (688 F.2d at 506), and declared that relevant factors to be considered in such a balancing include: (1) the cost and time of the disputed operation relative to the cost of the affected component and the time required for assembly of the whole article; (2) whether the operations in question were necessary to the assembly process; (3) whether the operations were so related to assembly as to be logically performed during assembly; and (4) whether economic or other practical considerations dictate performance of the operations at the time of assembly. Id. at 506 & n.7. See also United States v. Oxford Industries, Inc., 668 F.2d 507, 511 n.11 (CCPA 1981) (in this companion case to Mast, the court noted, in particular, that cost is only one factor to be considered).

Mast, with its eminently reasonable "balancing" approach to incidentality, ran contrary to an existing Customs regulation, promulgated in 1975, that attempted to apply a bright-line test to incidentality.[6] Eventually, when Customs decided that certain top-coat painting operations performed in conjunction with automotive vehicle assembly should preclude preferential tariff treatment for the use of

---

[6] Customs, by regulation, provided examples of what, in its view, constituted operations incidental to assembly (including cleaning, the removal of rust, grease, paint or other preservative coating, the application of "preservative" paint or other coating, including a metallic coating or a protective encapsulation), and those not incidental to assembly (including melting of ingots, molding cast metal, cutting parts to pattern, "painting primarily intended to enhance the appearance of an article or to impart distinctive features or characteristics," chemical, mechanical or other treatments of metal or other materials which impart significant new characteristics or qualities). 19 C.F.R. §§ 10.16(b), 10.16(c) (1995).

U.S.-made auto body components, these two views collided. As a result, in General Motors Corp. v. United States, 770 F. Supp. 641, 646-47, (Ct. Int'l Trade 1991), App. 32-47, 42-46, rev'd, 976 F.2d 716 (Fed. Cir. 1992), App. 16-25, the Court of International Trade found no support in the statute or in prior case law (including Mast) for the bright-line view, as expressed in the regulation, that permissible painting is limited exclusively to preservative (rather than decorative) painting. Rather, the trial court found that application of the Mast criteria (including whether the operation is most logically performed during assembly) weighed convincingly in favor of considering the top-coating to be incidental to assembly. 770 F. Supp. at 646, App. 42.

With the Federal Circuit's split decision reversing the lower court (not on the grounds that bright lines should prevail over balancing but that, from a contorted, cost-only view, the painting at issue was not "minor"), General Motors, 976 F.2d 716, App. 16-31, the state of the law as it applies to this issue was placed, and continues to be left, in turmoil.

2. The Decision Below Is Aberrational And Mischievous: By Failing To Require A Balancing Of Traditional Factors, The Court Of Appeals Has Opened The Door To Frustrating The Congressional Will; By Focusing Exclusively On Cost, And Especially Capital Cost, It Has Unsettled That Which Had Never Been Nor Should Ever Have Been In Doubt.

General Motors addressed the same provision of law as that in question here: a duty exemption applies to U.S. fabricated components that have not been advanced in value or improved in condition except by assembly or by opera-

tions incidental to assembly, such as cleaning, lubricating and painting. Moreover, the facts of General Motors are virtually indistinguishable from those at hand: steel auto body parts, produced in the United States, were exported to Mexico for assembly, and were subjected to protective primer paint and top-coat color painting in the course of assembly. In that case, Customs, under its regulation that draws a distinction between protective and decorative painting, disallowed beneficial tariff treatment solely on the basis of the application of an appearance-enhancing top coat. The Court of International Trade found the regulatory distinction between protective and decorative painting to be without support and, applying the principles of Mast and Oxford, determined the painting at issue in General Motors to be incidental to assembly. The government appealed that decision and, in an extreme departure from Mast (wherein the relevant inquiry was posed as whether an operation of a minor nature was indeed incidental), a divided panel of the Federal Circuit held, without even considering the regulation, that permissible non-assembly operations must be "minor" as well as "incidental". As a result of this misdirected focus, and solely on the basis of the single factor of relative cost (with respect to which the majority ventured far beyond previously accepted techniques and applied an unprecedented and inapposite analysis involving allocations of investment in non-assembly capital equipment), two Federal Circuit judges determined that the paint operation precluded the application of item 807.00 to top-coated auto body components.

In a carefully reasoned dissent in General Motors, the Chief Judge roundly criticized the majority's unwarranted resort to and subsequent misreading of legislative history, which approach led the majority to interject "minor" as a determinative qualifier for non-assembly operations in

addition to the sole statutory requirement that a non-assembly operation be "incidental" thereto. The Chief Judge then applied a comprehensive Mast-type analysis to demonstrate that a true balancing of all relevant criteria dictated a finding of incidentality with respect to the operation that Customs challenged, General Motors, 976 F.2d 716, 721-23 (Nies, C.J., dissenting), App. 26-31. Moreover, in dismissing as "ludicrous" a government suggestion as to how the operation in dispute might have been performed other than in connection with assembly, Judge Nies further expressed the view that the government's appeal was "frivolous" (id. at 722, App. 30). Nonetheless, the government prevailed. The Federal Circuit denied General Motors Corporation's petition for rehearing, and declined General Motors Corporation's suggestion for rehearing in banc. General Motors Corporation did not thereafter petition this Court for a writ of certiorari.

Now, the very same issue arises with Chrysler's claims under the very same provisions (in subheading 9802.00.80, HTS). Here, on the force of the General Motors decision, Customs denied 9802.00.80 treatment for Chrysler's steel auto body parts which also were produced in the United States, were exported to Mexico for assembly, and were subjected to primer and top-coat painting in the course of assembly. Chrysler challenged Customs' action in the Court of International Trade and, constrained and bound by the General Motors precedent, that court upheld Customs' denial of subheading 9802.00.80 benefits.

Nonetheless, the trial court clearly articulated dissatisfaction with the implications of the Federal Circuit's holding in General Motors, recognizing that the Federal Circuit had imposed restrictions that reached even beyond the extremes of Customs' bright-line test. (Under the

reasoning of the General Motors majority, even if the overall purpose of painting is preservative, it still would not be allowable if it were not also a "minor" operation under the cost comparison analysis expounded in that decision.) In addition, the trial court candidly endorsed and embraced the dissent in General Motors, describing the practical appeal of considering whether a disputed operation is an integral part of assembly. Finally, it noted that the plain terms of the statute support an allowance in this case and that "Congress may have intended to draw a clearer line than the courts are recognizing." Chrysler Corp. v. United States, Slip Op. 95-39 at 7 (Ct. Int'l Trade Mar. 14, 1995), App. 7-14, 13.

When Chrysler appealed the result dictated by General Motors, a Federal Circuit panel that included the judge who authored the majority opinion in General Motors merely reiterated the determination in that decision (i.e., that an operation must be "minor" in order to be "incidental"), and noted that controlling precedent had correctly been applied below. In its Chrysler Corp. opinion however, the Federal Circuit also took pains to note that, under the rule that prior decisions of a panel of the court are binding precedent on subsequent panels unless and until overturned in banc, the appellate court's decision in this case also was controlled by General Motors.

Therefore, in seeking this Court's review, the petition does not represent an assault on legions of cases that pronounce well-settled principles of customs law. Chrysler Corp. presents an issue of exceptional and expansive economic importance, and it is an issue that represents an extreme departure from the course of case law that, until recently, guided Customs' administration of this important tariff provision in a consistent direction that gave practical effect to a statute crafted to keep an American industrial base

engaged in production sharing. Moreover, and beyond the fact that the Federal Circuit's position is in conflict with the clear purpose of the statute, even under a requirement that an operation "incidental" to assembly must be "minor" as well, the Federal Circuit has failed to consider in the proper light and to accord due respect to the very factors that it has articulated as relevant to such a determination. That is, the majority's unusual and unidimensional approach to the evaluation of costs in General Motors (which was perpetuated in this case) departs from prior precedent by failing to balance various considerations relevant to an inquiry as to incidentality, and introduces a new and demonstrably irrelevant consideration (i.e., capital investment) that complicates administration, reduces predictability, and potentially leads to anomalous results.

The current approach of the Federal Circuit, which calls for evaluation of all non-assembly operations in the aggregate (rather than examination only of a disputed top-coating operation), and places novel emphasis upon accounting for depreciation of capital investments, represents an analytical environment where the forest is obscured by the trees. While paying homage to the Mast balancing test, the Federal Circuit has adopted an approach that reflects the absence of any balancing. Notwithstanding that the General Motors majority acknowledged satisfaction of at least three of the Mast indicia of incidentality, the court then focused narrowly on cost, to the virtual exclusion of all other factors. Such elevation of and emphasis upon a single criterion, particularly involving a one-sided view of cost, simply cannot be condoned. See Oxford Industries, supra, 668 F.2d at 511 n.11 ("Cost, of course, is only one factor to be considered when making an 807(c) [i.e., incidentality] determination.").

Finally, and most disturbing, is the Federal Circuit's introduction of an approach that attempts to account for capital costs. Nowhere in Mast (or Oxford) is there any suggestion that depreciation of machines used in non-assembly work should be considered at all,[7] nor would it make any sense to do so. Plainly, for manufacturers to consider utilization of subheading 9802.00.80 in the first place, the driving consideration necessarily must be labor costs; mechanized operations will occasion similar costs regardless of the site of investment, but if it is necessary to perform the automated operation in conjunction with assembly (i.e., if the operation is incidental to assembly), such capital investment logically and necessarily will be drawn to the location of the low cost labor pool. In other words, investment in automated operations must be expected to follow the cost-advantageous assembly labor pool, simply because such operations are incidental to assembly. Where such investment clearly is driven by the potential of subheading 9802.00.80 benefits, it makes no sense to preclude those benefits on the basis of such investment.

By injecting capital equipment depreciation into the "incidental" (or even "minor") equation, the Federal Circuit has opened an analytical Pandora's Box. Such equipment may well be American-made and even American-owned (and leased to a related assembler abroad). Should the location of the company books upon which such equipment is carried

---

[7] The Mast trial court (quoted at 668 F.2d 503) found that "the fact that these [challenged] operations were accomplished by machines is of no moment in the overall assessment of their significance." In Oxford, the appellate court noted that the disputed operation "is one of the cheapest, fastest, and most automatic operations concomitant with the assembly process" (668 F.2d at 510), but expressed no concern over the investment in the machines used.

determine the incidentality of the operations performed? Should the replacement of an aging machine with a new (higher-cost) model change the character of an operation from incidental to impermissible simply because it is performed more reliably and with fewer disruptions for repairs? To say the least, the Federal Circuit's new analysis makes it improbable that the results intended by Congress will be achieved.[8]

The Federal Circuit has reversed the entire historical thrust of the provisions of subheading 9802.00.80, and the core purpose of the statute stands to be frustrated. The result is only too predictable. Because of the denial of the duty deduction here, other U.S. fabrication industries will likely be imperiled. As Judge Nies opined: "This cannot be the intent of Congress." General Motors, 976 F.2d at 723, App. 31 (Nies, C.J., dissenting).

---

[8] Nor is such mischief confined to the case of an automobile assembler's equipment for top-coat painting; it affects every operation set forth in the statute (e.g., machines for injecting lubricants into any assembly with moving parts; washers or conveyors for transporting parts through baths of solvents; equipment used to apply or remove coatings; and, of course, all forms of equipment needed for the safe use and sound disposal of hazardous materials used in or generated by such operations). Indeed, there is no operation among those already viewed by Customs as incidental to assembly that is not commonly performed by machine. See 19 C.F.R. § 10.16(b) (trimming or removing excess material may be done by complex machine tools; cutting to length may involve high precision and highly automated devices; and calibration and testing may require the most sophisticated of electronic instruments).

CONCLUSION

Perhaps because customs controversies are decided by lower courts having national jurisdiction, this Court has not reviewed a customs case since 1966, when it granted certiorari and summarily reversed a decision of the CCPA. United States v. Clayton Chemical & Packaging Co., 383 U.S. 821 (1966). Here, although there is an absence of a conflict between the Circuits, a divided judiciary below has needlessly left an important legislative program governing scores of billions of dollars of annual imports in a shambles. As the trial judge in this case lamented before bowing, as required, to precedent (Chrysler Corp., Slip Op. at 8-9; App. 14):

> Judge Nies, in dissent in General Motors, indicated that if a painting operation must be done as an integral part of the assembly process, it is incidental to assembly and the affected components are not dutiable. 976 F.2d at 722-23. This is an appealing interpretation of the statute . . . , but it is not the current law.

She is, of course, correct: "[I]t is not the current law;" but it should be. The petition should be granted.

Respectfully submitted,

Frederick L. Ikenson
Counsel of Record for Amici Curiae
Frederick L. Ikenson, P.C.
1621 New Hampshire Avenue, N.W.
Washington, D.C. 20009
Telephone: (202) 483-8900

Dated: July 19, 1996

Supreme Court, U.S.
FILED
AUG 20 1996
CLERK

No. 95-2058

In the Supreme Court of the United States

OCTOBER TERM, 1995

CHRYSLER CORPORATION,

Petitioner,

–v.–

THE UNITED STATES,

Respondent.

BRIEF OF AMICI CURIAE THE AMERICAN AUTOMOBILE MANUFACTURERS ASSOCIATION AND THE ASSOCIATION OF INTERNATIONAL AUTOMOBILE MANUFACTURERS IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

PHILIP D. BRADY
C. DEAN MCGRATH, JR.
AMERICAN AUTOMOBILE MANUFACTURERS ASSOCIATION
1401 H Street, N.W., Suite 900
Washington, D.C. 20005

CHARLES H. LOCKWOOD
ASSOCIATION OF INTERNATIONAL AUTOMOBILE MANUFACTURERS
1001 19th Street N., Suite 1200
Arlington, Virginia 22209

Of Counsel

ROBERT B. SILVERMAN
Counsel of Record
ERIK D. SMITHWEISS
GRUNFELD, DESIDERIO, LEBOWITZ & SILVERMAN LLP
245 Park Avenue, 33rd Floor
New York, New York 10167
(212) 557-4000

Attorneys for Amici Curiae

Dated: August 16, 1996

Virgil Mountain, Inc. (212) 779-4046 (L3571)

27 pp

TABLE OF CONTENTS

Page

Table of Authorities ii

Interest of *Amici Curiae* 1

Summary of Reasons for Granting Certiorari 5

Reasons for Granting Certiorari 6

I. The Decision Below Conflicts With Rules of Statutory Construction 6

II. The Decision Below Conflicts With Prior Lower Court Precedent Interpreting The Same Tariff Provision 10

III. This Case Presents Issues Of Substantial Importance Under The Tariff Laws 14

A. Subheading 9802.00.80 Has A Major Impact On International Trade 15

B. Congress Added The Statutory Language At Issue To Liberalize Duty-Free Eligibility of U.S. Made Components 16

C. The Decision Below Undermines The Statutory Purpose 18

D. The Decision Below Impedes Uniform and Predictable Applications of the Statute 19

Conclusion 20

TABLE OF AUTHORITIES

Page

CASES

Asiatic Petroleum Co., Ltd. v. Insular Collector of Customs, 297 U.S. 666 (1936) 8, 14

Barr v. United States, 324 U.S. 83 (1945) 14

Brown v. Gardner, 115 S.Ct. 552 (1994) 6, 7

Chrysler Corp. v. United States, No. 95-1366 (Fed. Cir., Mar. 22, 1996) 2, 4, 13, 19

Chrysler Corp. v. United States, 20 CIT ___, Slip Op. 95-39 (Ct. Int'l Trade 1995) 4, 7, 18

General Instrument Corp. v. United States, 480 F.2d 1402 (CCPA 1973) 10

General Instrument Corporation v. United States, 462 F.2d 1156 (CCPA 1972) 12

General Instrument Corporation v. United States, 71 Cust. Ct. 51, C.D. 4470 (1973) 12

General Motors Corp. v. United States, 976 F.2d 716 (Fed. Cir. 1992) 3, 4, 7, 11, 13

General Motors Corp. v. United States, 770 F.Supp. 641 (Ct. Int'l Trade 1991) 9

Haggar Apparel Company v. United States, Slip. Op. 96-110 (Ct. Int'l Trade, July 12, 1996) 13

TABLE OF AUTHORITIES

Page

CASES

Ivan Allen Co. v. United States, 422 U.S. 617 (1975) 14

L'Eggs Products v. United States, 704 F.Supp. 1127 (Ct. Int'l Trade 1989) 10

Maneja v. Waialua Agricultural Co., 349 U.S. 254 (1955) 11 n.6, 18

Mast Industries, Inc. v. United States, 668 F.2d 501 (CCPA 1981) 10, 11, 12

Newark Morning Ledger Co. v. United States, 507 U.S. 546 (1993) 14

Rudolph Miles v. United States, 567 F.2d 979 (CCPA 1978) 10, 11

Samsonite Corp. v. United States, 889 F.2d 1074 (Fed. Cir. 1989) 10

Thor Power Tool Co. v. Commissioner of Internal Revenue, 439 U.S. 522 (1979) 14

United States v. Aetna Explosives Co., 256 U.S. 402 (1921) 14

United States v. Consolidated International Equipment & Supply, 442 F.2d 376 (CCPA 1971) 18

TABLE OF AUTHORITIES

Page

CASES

United States v. George S. Bush & Co., Inc., 310 U.S. 371 (1940) 14

United States v. Oregon, 366 U.S. 643 (1961) 6

United States v. Turkette, 452 U.S. 576 (1981) 6, 7, 9

West India Oil Co. v. Domenech, 311 U.S. 20 (1940) 14

Zwicker Knitting Mills v. United States, 469 F.Supp. 727 (Cust. Ct. 1979) 10

STATUTES

18 U.S.C. § 1962(d) 9

19 U.S.C. § 1202, *Harmonized Tariff Schedules of the United States* (US ITC Pub. 2937),
General Note 3(a)(iv) 20
Chapter 96, Note 3 9
Subheading 9802.00.80 ..... 1, *passim*

19 U.S.C. § 1202, *Tariff Schedules of the United States* (US ITC Pub. 1910),
item 807.00 ..... 3, *passim*

Tariff Act of 1930, Paragraph 1615(a) 16

TABLE OF AUTHORITIES

Page

MISCELLANEOUS

Black's Law Dictionary (1979) 11 n.6

H.R. Rep. No. 342, 89th Cong., 1st Sess. 48 (1965) 7, 17

History of the Tariff Schedules of the United States, US ITC Pub. 1192 (1981) 17

Oxford English Dictionary (1987) 11 n.6

Pres. Proc. 6763, 60 Fed. Reg. 1007 (Jan. 4, 1995) 17

Production Sharing: Use of U.S. Components and Materials in Foreign Assembly Operations, 1990-1993, USITC Pub. 2886 (May 1995) 15

S. Rep. No. 530, 89th Cong., 1st Sess. 34 (1965) 17

Tariff Classification Study, Schedule 8, Part 1, Explanatory Notes 14 (U.S. Tariff Comm'n 1960) 16, 17

Webster's Third New Int'l. Dictionary (1966 ed.) 11 n.6

No. 95-2058

In the Supreme Court of the United States

OCTOBER TERM, 1995

CHRYSLER CORPORATION,

Petitioner,

-v.-

THE UNITED STATES,

Respondent.

BRIEF OF AMICI CURIAE THE AMERICAN AUTOMOBILE MANUFACTURERS ASSOCIATION AND THE ASSOCIATION OF INTERNATIONAL AUTOMOBILE MANUFACTURERS IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

INTEREST OF AMICI CURIAE[1]

The American Automobile Manufacturers Association (AAMA) is a non-profit national trade organization. Its member companies, Chrysler Corporation, Ford Motor Company and General Motors Corporation, are principally engaged in the production and sale of motor vehicles. The Association of International Automobile Manufacturers (AIAM) is a trade association organized as a non-profit corporation under the laws of the District of

[1] *Amici Curiae* appear with the consent of petitioner and respondent.

Columbia, which represents the American subsidiaries of international automobile companies.[2]

The decision below, *Chrysler Corp. v. United States*, No. 95-1366 (Fed. Cir., Mar. 22, 1996) (*"Chrysler"*), involves the assessment of customs duties on motor vehicles assembled in Mexico and imported into the United States. The motor vehicles incorporate U.S. made components, including fabricated sheet metal components that form the vehicle body. During the assembly process, the U.S. origin sheet metal components were subjected to a painting process typical of that used by most manufacturers in the course of producing finished motor vehicles. When the vehicles were imported into the U.S., Chrysler claimed duty free treatment for these sheet metal components under subheading 9802.00.80 of the Harmonized Tariff Schedules of the United States (HTSUS). Subheading 9802.00.80 exempts from duty the value of U.S. origin fabricated components assembled abroad that are not advanced in value or improved in condition abroad "except by being assembled and except by *operations incidental to the assembly process, such as* cleaning, lubricating or *painting*." 9802.00.80(c), HTSUS (emphasis added). The U.S. Customs Service denied Chrysler's claim on the painted components, and assessed customs duties thereon.

---

[2] AIAM's member companies include American Honda Motor Co., American Suzuki Motor Corp., BMW of North America Inc., Fiat Auto U.S.A., Inc., Hyundai Motor America, Isuzu Motors America, Inc., Kia Motors America, Inc., Land Rover North America, Inc., Mazda Motor America, Inc., Mitsubishi Motor Sales of America, Inc., Nissan North America, Inc., Porsche Cars North America, Inc., Rolls-Royce Motors Cars, Inc., Subaru of America, Inc., Toyota Motor Sales, U.S.A., Inc., Volkswagen of America, Inc., and G Volvo North America Corp.

Amici curiae are manufacturers of motor vehicles distributed and sold within the United States, including motor vehicles assembled in foreign countries with the use of U.S. made components. Many of these vehicles are subsequently imported into the United States with claims for duty allowances under subheading 9802.00.80. *Amici curiae* are also the major end users of motor vehicle parts assembled abroad with U.S. made components which are imported under subheading 9802.00.80. As the largest users of subheading 9802.00.80, *amici curiae* have a vital interest in the proper and effective administration of the statute, and the application of the duty allowance to the full extent intended by Congress.

The instant action is the second of two cases before the Federal Circuit to challenge the Customs Service's denial of duty-free entry under subheading 9802.00.80 (and its identical predecessor provision, Item 807, Tariff Schedules of the United States (TSUS)) to U.S. made automobile components that had been painted during an assembly operation abroad. In the first action, *General Motors Corp. v. United States*, 976 F.2d 716 (Fed. Cir. 1992) ("*General Motors*"), the trial court ruled that a similar painting process was "incidental to assembly" of the motor vehicles. The Federal Circuit reversed in a 2 to 1 decision. Without expressly finding that the painting operation was not incidental to assembly of the vehicles, the majority held that the painting operation was "not within the scope" of the statute because it was not "of a minor nature." 976 F.2d at 721. Chief Judge Nies strongly dissented on the grounds that the plain language of the statute required a duty allowance because the painting operation was incidental to the assembly process. Chief Judge Nies refused to impose a restriction not found in the statute.

In *Chrysler*, the trial court again found that the painting process at issue was logically performed during the process of assembling the motor vehicle. *Chrysler v.*

United States, 20 CIT ___, Slip Op. 95-39, at 4 n.4 (Ct. Int'l Trade 1995) ("painting must take place after welding [the U.S. origin sheet metal into the vehicle body] . . . [and] cannot be performed at the end of the assembly process . . ."). The trial court clearly believed this painting process was incidental to the assembly of the imported vehicle, stating, "[p]ainting operations that are such an integral part of the assembly process, as the painting processes at issue here, may have been intended by Congress to be found 'incidental to assembly' [and] [t]he plain terms of the statute support such a reading. . ." *Id.* at 7. In spite of these findings, the trial court was compelled to uphold denial of duty free entry under subheading 9802.00.80 because, under the majority opinion in *General Motors*, the painting process was not of a "minor nature." *Id.* at 4, 6. The Federal Circuit panel below affirmed, noting it was bound by *General Motors* until overturned. *Chrysler*, No. 95-1366 at 6.

The impact of these decisions is far reaching. Any cleaning, lubricating, painting or other process, no matter how incidental to assembly of the finished article, will preclude 9802.00.80 eligibility if it is found not to be of a "minor nature." Yet, as noted by the trial court in the instant case, the *General Motors* test—restricting 9802.00.80 eligibility to "minor" operations—is not supported by the plain language of the statute, results in a less administrable statute, and will impede "fulfillment of the Congressional intent to promote use of United States made components abroad." Slip Op. 95-39 at 7. The lower court's decision accordingly will have a substantial adverse impact upon the ability of *amici curiae*—as well as other industries—to take full advantage of the tariff benefits intended by Congress under subheading 9802.00.80.

SUMMARY OF REASONS FOR GRANTING CERTIORARI

The decision below is clearly erroneous and should be reversed. The Court of Appeals disregarded settled precedent of this Court by reading a restriction into the statute that is not found in the plain and unambiguous words employed by Congress. The tariff statutes, including 9802.00.80, affect billions of dollars of U.S. commerce, and were drafted by Congress to accomplish specific policy objectives. The lower courts should not be free to legislate new statutory limitations where Congress has not done so.

Furthermore, the decisions in *Chrysler* and *General Motors* conflict with prior decisions of the Federal Circuit and the Court of Customs and Patent Appeals involving the same tariff statute. Prior decisions applied the statute by examining the relationship of the non-assembly operation at issue to the nature of the entire assembly process, to determine if it was "incidental" thereto. No prior court ever restricted the scope of 9802.00.80(c) HTSUS, or 807.00 (c), TSUS, to "minor" non-assembly operations. There are currently cases pending in the trial court that may be affected by a decision herein, and further litigation can be expected absent a definitive ruling by this Court.

Finally, certiorari is warranted due to the importance of the issues to the administration of a tariff provision affecting over $16.9 billion in U.S. exports and $56 billion in imports. Congress enacted the statutory language at issue so as to encourage the use of U.S. made components in the foreign assembly of goods intended for the U.S. market, thereby stimulating U.S. manufacturing and employment. The Federal Circuit's ruling undermines these objectives. The ruling below also impedes uniform and predictable application of the statute and runs contrary to long term Congressional trends to reduce tariffs and trade barriers.

REASONS FOR GRANTING CERTIORARI

I.

The Decision Below Conflicts With Rules Of Statutory Construction

The Federal Circuit's decisions in *Chrysler* and *General Motors* conflict with well-settled decisions of this Court on statutory construction, and thereby frustrate the intent of Congress. Certiorari is warranted to remedy this error. *See United States v. Oregon*, 366 U.S. 643, 645 (1961) ("Because of the importance of this question of federal statutory construction . . . we granted certiorari."). If a statute is clear and unambiguous, the courts must give effect to the intent of Congress as expressed in the statutory language. *See Brown v. Gardner*, 115 S. Ct. 552, 556 (1994). Consequently, where statutory provisions "are clear and unequivocal on their face, [there is] no need to resort to the legislative history of the Act" to find a different meaning. *Oregon, supra*, 366 U.S. at 648. Moreover, seemingly clear statements of intent in the legislative history "have never been regarded as sufficiently compelling to justify deviation from the plain language of a statute." *Id.; see also United States v. Turkette*, 452 U.S. 576, 580 (1981) (unambiguous statutory language is ordinarily "conclusive" absent "'a clearly expressed legislative intent to the contrary'.").

Subheading 9802.00.80 states that articles assembled abroad with U.S. components will receive a duty allowance upon their return to the U.S. if certain conditions are satisfied. Subsection (c) permits the duty allowance for those U.S. components sent abroad which have not been advanced in value or improved in condition except by assembly or "by operations incidental to the assembly process such as cleaning, lubricating and painting." 9802.00.80(c), HTSUS. The trial court below and the

dissent in *General Motors* found this language to be clear and unambiguous. *Chrysler*, Slip Op. 95-39 at 7; *General Motors*, 976 F.2d at 721. Neither the majority in *General Motors* nor the panel in *Chrysler* stated that subsection (c) was ambiguous. Nonetheless, the appellate court focused on a single statement in a House Committee report—that "such operations, if of a minor nature incidental to the assembly process, ... would be permitted"[3]—and reasoned that the statute thus required non-assembly operations to be both "incidental to assembly" and "minor" in nature. 976 F.2d at 720 (operations must be "minor and incidental to assembly").

"Ambiguity is a creature not of definitional possibilities but of statutory context." *Brown, supra*, 115 S.Ct. at 555. Here, the statutory context of the phrase "incidental to assembly" creates no ambiguity, and the Federal Circuit did not so find. In plain and certain terms, the statute says that if a non-assembly operation is incidental to assembly of the article, it is permissible; operations that are not incidental to assembly are precluded. There is no cause to search beyond this statutory language for additional criteria, and it was clear error for the Court of Appeals to do so. Moreover, Congress specifically enumerated "painting" as an example of an operation incidental to assembly. This express statutory reference to "painting" is a clear indication that Congress intended to allow painting—such as that at issue—performed as an integral process during assembly; far clearer an indication of Congress' intent than the term "minor" found in a single committee report. *See, e.g., Turkette, supra*, 452 U.S. at 580 (the intent of Congress must be determined first from the language of the statute).[4]

---

3 H.R. Rep. No. 342, 89th Cong., 1st Sess. 48, 49.

4 The legislative history also supports the plain language construction advocated by the *General Motors* dissent. 976 F.2d at

The judiciary's prerogative to legislate a limitation on the plain language of a tariff provision has been rejected by this Court. In *Asiatic Petroleum Co., Ltd. v. Insular Collector of Customs*, 297 U.S. 666 (1936), a case decided under the Philippine Tariff Act of 1909, the lower court held that § 21 of the Act, providing for a refund ("drawback") of import duties on fuel subsequently used in "vessels engaged in trade with foreign countries," was limited to vessels of Philippine or American registry. 297 U.S. at 652. In reversing, this Court stated:

> The court below limited the scope of the drawback provision by inserting, in effect, after the word "vessels," as it appears in § 21, the words "of Philippine or American registry." The statute is plain upon its face. * * * **We are not at liberty to limit the application of so clear and unambiguous a statutory direction in the absence of convincing evidence that the intent of Congress was less sweeping than its words import.** We hold that the section applies to fuel sold to all vessels, of whatever registry, trading with foreign countries.

297 U.S. at 671-672 (emphasis added). The decision below directly conflicts with this (and other) Supreme Court authority by imposing a restriction that was not included in the statute.

---

722 ("807.00's legislative history explicitly names incidental painting as an operation which does not negate a duty allowance of imported components"). Thus, the legislative history is at best "ambiguous." *See Chrysler*, Slip Op. 95-39 at 7 n. 10. The statute, however, is not, and it is error to create an ambiguity in an otherwise clear statute by reference to legislative history.

In a similar vein, this Court in *Turkette, supra,* reversed a court of appeals decision which limited the term "enterprise" in 18 U.S.C. § 1962(d) to mean only legitimate enterprises, to the exclusion of criminal associations. Significantly, this Court stated that "[h]ad Congress not intended to reach criminal associations, it could easily have narrowed the sweep of the definition by inserting a single word, 'legitimate'." 452 U.S. at 581. The same reasoning applies to the decision below. Had Congress intended to limit incidental operations to those which are also "minor," it could easily have inserted the word "minor" prior to the word "incidental." In fact, where Congress intended to restrict a tariff provision to articles subjected to only "minor" processes or operations, it has used express words to that effect. *See, e.g.,* Chapter 96, Note 3, HTSUS ("'prepared knots and tufts for broom or brush making' applies only to . . . material, which [is] ready for incorporation . . ., or which require[s] only such further ***minor*** processes as trimming to shape at the top, . . ."). As stated by this Court in *Turkette,* "[t]he Court of Appeals . . . clearly departed from and [improperly] limited the statutory language." *Id.* The trial court in *General Motors* was therefore correct when it stated, "the Court is not inclined to infer words of limitation where Congress has so specifically omitted them . . ." 770 F.Supp. 641, 647 (Ct. Int'l Trade 1991), *revs'd,* 976 F.2d 716 (Fed. Cir. 1992).

The decision below raises an issue of statutory construction with implications well beyond the parties and controversy at bar. Subheading 9802.00.80 is but one of many special trade programs permitting an exemption from customs duties. Congress has carefully tailored these programs to meet specific legislative objectives, such as stimulating domestic manufacturing and employment by promoting exports of manufactured components, while balancing the needs of U.S. trade policy. It is clear that Congress acted deliberately when drafting the statutory language establishing the criteria for eligibility under

these programs. The Court of Appeals, however, apparently believes itself free to legislate additional criteria, even though Congress did not do so. Certiorari is warranted to remedy this error and insure meaningful judicial review of the tariff statutes, in accordance with the principles of statutory construction laid down by this Court.

II.

The Decision Below Conflicts With Prior Lower Court Precedent Interpreting The Same Tariff Provision

The plain language of the statute is controlling, and the Court of Appeals erred by failing to apply it. The decision below, however, also merits review by the Supreme Court because the lower court's current construction of subheading 9802.00.80 conflicts with prior decisions of the lower courts applying the same statutory language.

Prior to *Chrysler* and *General Motors*, the lower courts determined whether an operation was "incidental to assembly" under item 807.00(c), by comparing the relationship of the operation in issue to the entire manufacturing or assembly process of the final product. *See, e.g., General Instrument Corp. v. United States*, 480 F.2d 1402, 1406 (CCPA 1973) ("classification under item 807.00 depends upon the relationship of the disputed element to the whole"); *Rudolph Miles v. United States*, 567 F.2d 979 (CCPA 1978); *Mast Industries, Inc. v. United States*, 668 F.2d 501, 506 (CCPA 1981) ("*Mast*"); *L'Eggs Products v. United States*, 704 F.Supp. 1127, 1132 (Ct. Int'l Trade 1989); *Zwicker Knitting Mills v. United States*, 469 F.Supp. 727, 737 (Cust. Ct. 1979), *aff'd*, 613 F.2d 295 (CCPA 1980); *See also Samsonite Corp. v. United States*, 889 F.2d 1074, 1077

(Fed. Cir. 1989) ("The critical inquiry . . . is not the amount of processing that occurred . . ., but its nature.").[5]

Most importantly, in *Mast*, the court clearly indicated that the statutory test under subsection (c) is whether the disputed operation is "incidental" in terms of its relationship to the whole assembly process. The court set forth four factors relevant to that determination. A cost comparison to determine whether the operation was "minor" was only one of the four factors. *Mast*, 668 F.2d at 506. "The remaining three factors in *Mast* focus on the relationship between the operation and the assembly process in order to determine to what extent the assembly process dictated that the operation be performed abroad with the assembly." *General Motors*, 976 F.2d at 722 (Nies, C.J., dissenting). *See also Rudolph Miles, supra*, 567 F.2d at 983 (burning holes in steel beams, "measures that at first blush might seem to produce dramatic changes," were incidental to assembly of railroad cars because the techniques employed were appropriate "in perspective" to the article being assembled and the assembly process). This interpretation is consistent with the common and ordinary meaning of "incidental."[6]

---

5 *Samsonite* concerned the related question of whether the processing abroad constituted "further fabrication" of the U.S. components. *See* Item 807(a), TSUS, and subheading 9802.00.80 (a), HTSUS (requiring that the components "were exported in condition ready for assembly without further fabrication").

6 *Black's Law Dictionary* (1979) ed.) ("depending upon or appertaining to something else as primary; . . . something incidental to the main purpose"); *Webster's Third New Int'l. Dictionary* (1966 ed.) ("attendant in position or significance; subordinate, nonessential"); *Oxford English Dictionary* (1987) ("Occurring or liable to occur in fortuitous or subordinate conjunction with something else of which it forms no essential part"). *See also Maneja v. Waialua Agricultural Co.*, 349 U.S. 254, 261

Prior decisions also provide strong authority with respect to painting (coating) operations such as those involved here. For example, in *Mast*, the court stated, "...[i]ndeed, the statute sets forth 'painting' of a component as an example of permissible operations incidental to assembly ... It is difficult to visualize a situation where the sole purpose of painting would be to facilitate assembly, or even where painting would be essential to the assembly process." 668 F.2d at 505. Similarly, in *General Instrument Corporation v. United States*, 462 F.2d 1156 (CCPA 1972), the court held that coating assembled components with a dark colored epoxy was an acceptable 807.00 process. In *General Instrument Corporation v. United States*, 71 Cust. Ct. 51, C.D. 4470 (1973), the court held that encapsulating U.S. fabricated components in plastic after assembly abroad was also an acceptable process under the statute. Application of the foregoing standards to Chrysler's assembly process should have resulted in a decision holding that the painting operation was appropriate to the size and nature of the article being assembled, was clearly performed in connection with and subsidiary to the assembly process, and thus was incidental to assembly.

General Motors and *Chrysler*, however, deviated markedly from this precedent by disallowing the duty benefit because it found that the painting operation was not "minor in nature." The Court of Appeals relied almost exclusively upon a comparison of costs associated with the disputed operation *(e.g.*, capital investment in the painting operation), to costs associated with the disputed U.S. components *(e.g.*, capital investment in the body shop, where the disputed components were welded

---

(1955) (in determining whether transporting sugarcane from the fields to the mill via railroad is "incident to" farming, ***"we must look to the function performed"*** in relation to farming, rather than the unusual (and presumably capital intensive) transport method employed.) (emphasis added).

together). *General Motors*, 976 F.2d at 720-721; *Chrysler*, No. 95-1366 at 5. The question of whether the operation was incidental to the assembly process under previously established criteria was ignored. The incorporation of "painting" in the statute creates a presumption that such operations are acceptable. The appellate court had no authority to disregard this clear expression of Congressional intent.

The trial judge below criticized this approach, and while the Federal Circuit panel in *Chrysler* stopped short of doing the same, one can discern its lack of enthusiasm for the *General Motors* decision. As emphasized by the dissent in *General Motors*, the majority's approach runs afoul of prior precedent, including *Mast*, which found other operations to be incidental to assembly based on the nature of the assembly process and its relationship to the processing at issue. 976 F.2d at 723 ("The nature of the assembly process dictated that the painting operations be performed concurrently with the assembly of the car and, therefore, the painting operations conducted in Mexico were 'incidental to the assembly process'.") (Nies, C.J., dissenting).[7]

The tariff provision at issue, now embodied in subheading 9802.00.80, HTSUS, has been in existence since 1963, and will in all likelihood remain as part of any successive tariff schedules. Presently, over a dozen other importers, aside from Chrysler, have cases pending in the Court of International Trade contesting the denial of duty free entry for U.S. components under subheading 9802.00.80. *See, e.g., Haggar Apparel Company v. United*

---

[7] The *General Motors* majority purports to follow *Mast* in holding that painting which is not "minor in nature" is "beyond the scope" of item 807(c). Yet the only Circuit judge among them involved in *Mast*, Judge Nies, concluded that the majority's reasoning conflicted with *Mast*.

States, Slip Op. 96-110 (Ct. Int'l Trade, July 12, 1996). The issue presented is recurring, unsettled, and in need of resolution by this Court. *See, e.g., Thor Power Tool Co. v. Commissioner of Internal Revenue*, 439 U.S. 522, 525 (1979) ("We granted certiorari . . . to consider these important and recurring income tax accounting issues").

III.

This Case Presents Issues Of Substantial Importance Under The Tariff Laws

This Court has previously recognized the propriety of certiorari where, as here, a case presents an important issue arising under the tariff and revenue laws. *See, e.g., Barr v. United States*, 324 U.S. 83, 85 (1945) ("This case [construing § 522(c) of the Tariff Act of 1930] is here on a petition for a writ of certiorari which we granted because of the importance of the questions presented"); *West India Oil Co. v. Domenech*, 311 U.S. 20, 24 (1940) ("We granted certiorari . . . because the question presented is of importance in the administration of the customs laws of the United States . . ."); *United States v. George S. Bush & Co., Inc.*, 310 U.S. 371, 375 (1940) ("We granted certiorari because of the importance . . . to the administration of the flexible tariff provisions of the Tariff Act of 1930); *Asiatic Petroleum Co. v. Insular Collector of Customs, supra*, 297 U.S. at 667 (1936) ("The reasons assigned [for certiorari] are the importance of the question . . ."); *United States v. Aetna Explosives Co.*, 256 U.S. 402 (1921); *see also Newark Morning Ledger Co. v. United States*, 507 U.S. 546, 553 (1993) ("In order to resolve an issue of substantial importance under the Internal Revenue Code and to settle a perceived conflict, we granted certiorari"); *Ivan Allen Co. v. United States*, 422 U.S. 617, 624 (1975) (". . . and because of the importance of the issue in the administration of the accumulated earnings tax, we granted certiorari").

A. Subheading 9802.00.80 Has A Major Impact On International Trade

Subheading 9802.00.80, HTSUS, serves vital interests of U.S. manufacturers, exporters, importers and workers. Since its inception in 1963, it has been used successfully to improve price competitiveness or increase profitability of goods sold in the U.S. market by using U.S. origin components, reduce the cost of cross-border transfers of both in-process materials and final goods, rationalize production between domestic and foreign plants, and penetrate foreign markets through U.S. exports. *See Production Sharing: Use of U.S. Components and Materials in Foreign Assembly Operations, 1990-1993*, USITC Pub. 2886 (May 1995) at I-1. In 1993, the most recent year for which such figures are available, $16.9 billion in U.S. fabricated components exported for assembly abroad were entered under HTSUS subheading 9802.00.80. This represents a staggering increase of three-thousand eight-hundred and ten percent (3,810%) over the $433.7 million in U.S. components entered in 1970.

A major beneficiary of the trade program has been the labor employed in the U.S. manufacturing of the $16.9 billion in components which were assembled abroad, and then entered under the tariff program—components which otherwise might have been foreign made had there been no duty incentive to using U.S.-made goods. In this regard, in 1993, companies incorporating U.S. made components into foreign assembled goods saved over one billion dollars in customs duties under 9802.00.80. *Id.* at 1-13. Thus, the U.S. International Trade Commission, an independent body established by Congress to assist it in drafting and administering tariff and trade legislation, stated recently that "production sharing [under 9802.00.80] remains an important part of the global competitiveness strategy for many U.S. firms . . ." *Id.* at ix.

Over $56.4 billion in goods, which represents nearly ten percent of all imports, entered the U.S. in 1993 with claims for duty allowances on U.S.-made components under 9802.00.80. USITC Pub. 2886 at 1-14. Motor vehicles accounted for 45% of this amount. *Id.* Other major users of 9802.00.80 include the apparel, consumer electronic, semiconductor, machinery, and motor vehicle parts industries. It is clear that the statute at issue in this case is of great significance to U.S. trade policy, and to U.S. industry and labor. Due to such importance, certiorari is warranted.

B. Congress Added The Statutory Language At Issue To Liberalize Duty-Free Eligibility of U.S. Made Components

The monumental growth in the value of U.S. fabricated components imported under 9802.00.80 underscores Congressional intent to promote U.S. exports by liberalizing the duty benefit conferred through the use of U.S. made components. Prior to the current law, paragraph 1615(a) of the Tariff Act of 1930 authorized duty free entry of U.S. goods exported and returned without having been advanced in value or improved in condition abroad by any process of manufacturing or other means. Beginning in 1954, Customs followed a judicially approved practice of allowing U.S. components assembled into foreign articles abroad to be entered duty free under this provision on a theory of "constructive segregation." *Tariff Classification Study*, Schedule 8, Part 1, Explanatory Notes 14 (U.S. Tariff Comm'n 1960). When the Tariff Schedules of the United States (TSUS) were enacted in 1963, item 807.00 thereof continued the substance of the prior practice by allowing for duty free entry of U.S. components assembled abroad if not "advanced in value or improved in condition by any means other than the act of assembly." Item 807.00, TSUS (1963). Item 807 however, "limit[ed] the extent of the advancement or improvement to that which is brought

about solely by the act of assembly." *Tariff Classification Study, supra,* at 15.

This provision was found too restrictive and difficult to administer. *See* H.R. Rep. No. 342, 89th Cong., 1st Sess. 48 (1965). Consequently, in 1965 Congress amended item 807.00 by adding the language at issue in this case, "specifically to permit" U.S. components to be advanced in value or improved "by operations incidental to the assembly process such as cleaning, lubricating, and painting." *Id.* at 49. In passing on this amendment, the Senate Committee on Finance stated, "[t]his bill (1) clarifies the type of articles which may be exported for assembly and then reimported; and (2) enlarges the class of activities which may be performed abroad without subjecting the U.S. product to duty." S. Rep. No. 530, 89th Cong., 1st Sess. 34 (1965). The 3,810 percent increase in the value of U.S. components imported under 9802.00.80 demonstrates that Congress' enlargement of permissible non-assembly activities under subsection (c) has had its desired effect of promoting the use of U.S. made components in foreign assembled goods.

Finally, the Federal Circuit's application of 9802.00.80 conflicts with the trend in Congressional policy toward the reduction in import duties and trade barriers. Since enactment of TSUS item 807.00 in 1963, Congress has reduced duty rates on goods from its principal trading partners on three separate occasions; the "Kennedy Round" reductions in 1967, the "Tokyo Round" reductions in 1979, and the "Uruguay Round" reductions in 1995. *See History of the Tariff Schedules of the United States,* USITC Pub. 1192 (1981); Pres. Proc. 6763, 60 Fed. Reg. 1007 (Jan. 4, 1995). The decision below attributes to Congress an intent to restrict access to free trade at a time when Congress is doing just the opposite.

C. The Decision Below Undermines The Statutory Purpose

The Federal Circuit's decisions in *Chrysler* and *General Motors* serve to defeat the legislative purpose embodied in subsection (c). As the trial court below noted, a test based upon whether an operation is an integral part of the assembly process, rather than whether an operation is "minor" under extensive costs analyses, would result in "a more administrable statute and fulfillment of the Congressional intent to promote use of United States made components in assembly abroad." Slip Op. 95-39 at 7.

Chrysler frustrates the intent of Congress by creating a disincentive for manufacturers to incorporate technological improvements into their foreign assembly operations. No one could genuinely dispute that Congress intended to allow U.S. fabricated sheet metal components to be painted as an incident to being assembled abroad into a motor vehicle. If Chrysler had hand-painted the vehicle body (which must be done after spot welding but prior to assembly with further components), then one could hardly question entitlement to the duty allowance. Yet, Chrysler, presumably to modernize and increase efficiency, made a capital investment in its painting process. Modernization does not change the incidental nature of the operation. *See, e.g., Maneja, supra,* 349 U.S. at 261 ("Certainly no one would argue that the agriculture exemption [covering operations "incident to" farming "such as delivery to . . . market"] did not apply to farm laborers who took the cane to the plant in wheelbarrows [and thus] [t]here is no reason to construe the FLSA so as to discourage modernization in performing this same function [when performed with an extensive railroad network]"); *United States v. Consolidated Int'l Equipment & Supply,* 442 F.2d 376 (CCPA 1971) (tariff provisions are presumed to cover "technological advancements").

It is clear that Congress did not intend to deny an incentive to use U.S. made components solely because the nature of the article being assembled dictated the use of a capital intensive painting process which, perhaps when compared only to the welding process in the body shop (as was done in *General Motors* and *Chrysler*), may appear substantial. When one considers the process required to assemble a motor vehicle, the painting operations at issue were no more substantial than necessary to accomplish a task—painting—which Congress undeniably intended to allow in the course of foreign assembly. It cannot be emphasized enough that the full cost of the painting operation performed abroad, as well as any other process incidental to the foreign assembly, remains fully dutiable under subheading 9802.00.80.

D. The Decision Below Impedes Uniform and Predictable Application of the Statute

Chrysler and *General Motors* give little if any guidance as to what constitutes an operation incidental to assembly. The Federal Circuit found two cost comparisons to be dispositive of whether a non-assembly operation is within the scope of subheading 9802.00.80; (1) a comparison of the cost of the disputed operation to the cost of the affected U.S. components, and (2) a comparison of the investment in disputed operations to the investment in the operations directly relating to assembly of the affected U.S. components. *Chrysler*, No. 95-1366 at 3. This analysis creates obvious difficulties in application. The court below focused primarily on a comparison of fixed assets (the paint shop and the body shop). This comparison will vary widely from one plant to another, and from one industry to another. It therefore fails to provide a reliable and workable framework for determining the only relevant issue; whether the operation was performed incidental to assembly of the imported article. Furthermore, the Federal Circuit's approach places firms or

industries with heavy capital investment in incidental operations at a significant disadvantage under the tariff statute. In essence, the courts and Customs are dictating to industry what types of processes will be incidental to assembly. There is certainly no indication in the statute or its legislative history that Congress intended such a result. Finally, U.S. importers are now being put to an onerous burden of providing the Customs Service with extensive cost accounting information in order to justify the claimed duty allowance. Yet if Congress had intended a cost or value test under the statute—as the Federal Circuit has created—it could have easily drafted one, as it has done for numerous other trade programs. *See, e.g.*, HTSUS General Note 3(a)(iv) (products of insular possessions must not contain more than 70% foreign materials by value). In sum, the decision below impedes uniform and predictable application of subheading 9802.00.80, thus warranting review by this Court.

CONCLUSION

For the foregoing reasons, *amici curiae* respectfully request that the petition for a writ of certiorari be granted.

Respectfully submitted,

ROBERT B. SILVERMAN
Counsel of Record
ERIK D. SMITHWEISS
GRUNFELD, DESIDERIO,
LEBOWITZ & SILVERMAN LLP
Attorneys for Amici Curiae
345 Park Avenue, 33rd Floor
New York, New York 10167-0002
(212) 557-4000

PHILIP D. BRADY
C. DEAN MCGRATH, JR.
AMERICAN AUTOMOBILE
MANUFACTURERS ASSOCIATION
1401 H Street, N.W., Suite 900
Washington, D.C. 20005

CHARLES H. LOCKWOOD
ASSOCIATION OF INTERNATIONAL
AUTOMOBILE MANUFACTURERS
1001 19th Street N., Suite 1200
Arlington, Virginia 22209

Of Counsel

Supreme Court, U.S.
FILED
AUG 23 1996
OFFICE OF THE CLERK

No. 95-2058

In the Supreme Court of the United States

OCTOBER TERM, 1995

CHRYSLER CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WALTER DELLINGER
Acting Solicitor General
FRANK W. HUNGER
Assistant Attorney General
DAVID M. COHEN
JOSEPH I. LIEBMAN
SAUL DAVIS
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

Whether sheet metal components that are assembled and painted in Mexico are entitled to duty-free treatment, accorded United States components, pursuant to subheading 9802.00.80 of the Harmonized Tariff Schedule of the United States.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	1
Argument	4
Conclusion	11

TABLE OF AUTHORITIES

Cases:

Arkansas v. *Oklahoma*, 503 U.S. 91 (1992)	9
Caminetti v. *United States*, 242 U.S. 470 (1917)	4
Ehlert v. *United States*, 402 U.S. 99 (1971)	10
Ernst & Ernst v. *Hochfelder*, 425 U.S. 185 (1976)	9
General Motors Corp. v. *United States*, 976 F.2d 716 (Fed. Cir. 1992)	2, 3, 4, 9
Metropolitan Stevedore Co. v. *Rambo*, 115 S. Ct. 2144 (1995)	4
Moskal v. *United States*, 498 U.S. 103 (1990)	4
Pauley v. *Bethenergy Mines, Inc.*, 501 U.S. 680 (1991)	10
Reno v. *Koray*, 115 S. Ct. 2021 (1995)	6
Swan & Finch Co. v. *United States*, 190 U.S. 143 (1903)	7
United States v. *Allen*, 163 U.S. 499 (1896)	7
United States v. *Brown*, 333 U.S. 18 (1948)	6
United States v. *Ron Pair Enterprises, Inc.*, 489 U.S. 235 (1989)	4

Statutes and regulations:

North American Free Trade Agreement, 19 U.S.C. 3301-3473	10
19 U.S.C. 3332(c)	10

Statutes and regulations—Continued: Page

19 C.F.R.:
Section 10.16 3
Section 10.16(b)(3) 9
Section 10.16(c) 3

Miscellaneous:

United States International Trade Comm'n, Harmonized Tariff Schedule of the United States (1996) ..... *passim*
H.R. Rep. No. 342, 89th Cong., 1st Sess. (1965) 9
S. Rep. No. 530, 89th Cong., 1st Sess. (1965) 7
Tariff Classification Study: Proposed Revised Tariff Schedules of the United States (Nov. 15, 1960) 7
Webster's Third New International Dictionary (1986) 5

In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-2058

CHRYSLER CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-6) is unpublished, but the decision is noted at 86 F.3d 1173 (Table). The opinion of the United States Court of International Trade (Pet App. 7-15) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 22, 1996. The petition for a writ of certiorari was filed on June 19, 1996. . The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

STATEMENT

1. This petition involves the partial denial of duty-free treatment for certain components of automobiles

imported from Mexico. Sheet metal components were shipped to Mexico, with other components, for use in the manufacture of petitioner's vehicles. Once in Mexico, the sheet metal components were assembled into a vehicle body and were extensively painted; those operations resulted in a finished painted body ready for assembly. Pet. App. 8-9. Although the sheet metal components originally were manufactured in the United States, the United States Customs Service (Service) determined that their value should be included in the dutiable value of the completed vehicles, because the painting operations conducted in Mexico were too significant to be considered merely "incidental to * * * assembly" under heading 9802.00.80 (hereinafter heading 9802) of the Harmonized Tariff Schedule of the United States (HTSUS). Pet. App. 2, 8-9.

2. Petitioner challenged the Service's determination by bringing suit in the United States Court of International Trade. The court noted that, under *General Motors Corp.* v. *United States*, 976 F.2d 716 (Fed. Cir. 1992), the central issue "is whether the painting process as a whole is of a 'minor nature.'" Pet. App. 10 (quoting *General Motors*, 976 F.2d at 720). Based on evidence showing that the cost of the Mexican painting process and the capital investment in that process were substantial and extensive when compared to the cost of the original sheet metal components, the cost of their assembly, and the capital investment for that assembly, the Court of International Trade found that petitioner's painting operations were not "minor," and thus did not meet the statutory requirement that they be "incidental to the assembly process." Pet. App. 3, 10-11. The Court of International Trade also held that the regulations

that implement the statutory provisions of HTSUS, particularly 19 C.F.R. 10.16, must be construed in light of the limitations imposed by the statute, and therefore cannot be invoked to shield from duty improvements that are not "minor" under *General Motors*. Pet. App. 11-12.

3. The court of appeals affirmed. Pet. App. 1-6. The court agreed with the trial court's view that *General Motors* foreclosed petitioner's contention that all painting operations must be deemed "incidental to the assembly process." The court explained that *General Motors* made clear that "the statute's reference to 'painting' is simply an exemplar of an operation which is potentially 'incidental to the assembly process,' not a definitive statement that all painting operations, no matter how extensive, are allowed under" HTSUS. Pet. App. 4-5 (quoting *General Motors*, 976 F.2d at 719). The court of appeals also rejected petitioner's reliance on 19 C.F.R. 10.16, noting that the regulation "must be read in light of *General Motors*." Pet. App. 5. The court noted that, in any event, petitioner's argument was foreclosed by the plain language of the regulation, which "provides that any *significant* process * * * shall not be regarded as incidental to the assembly and shall preclude the application of the exemption." *Ibid.* (quoting 19 C.F.R. 10.16(c)). Because petitioner did not "persuade[] [the court] that its painting operations were not significant or that they were not primarily intended to enhance the appearance of or to impart distinctive characteristics to the sheet metal parts," Pet. App. 5-6, the court affirmed the denial of duty-free status for the sheet metal parts.

ARGUMENT

The unpublished decision below, which is the only appellate decision besides *General Motors* to address the question presented in the 30 years since the pertinent statutory language was enacted, is correct. Moreover, the question presented lacks continuing significance for those in petitioner's position, because American car manufacturers operating in Mexico may now enjoy duty-free treatment to the extent that they comply with the North American-content requirements of the North American Free Trade Agreement. Accordingly, further review is not warranted.

1. In determining the meaning of a statute, the inquiry must begin with the "ordinary meaning" of the language chosen by Congress. See, *e.g.*, *Moskal* v. *United States*, 498 U.S. 103, 108-109 (1990). The language of HTSUS is dispositive in this case, "for where, as here, the statute's language is plain, 'the sole function of the courts is to enforce it according to its terms.'" *United States* v. *Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989), quoting *Caminetti* v. *United States*, 242 U.S. 470, 485 (1917); accord *Metropolitan Stevedore Co.* v. *Rambo*, 115 S. Ct. 2144, 2147 (1995).[1]

Under subsection 9802(c) of HTSUS, petitioner may qualify for the exemption it seeks *only* if its

---

[1] We recognize that the pertinent statutory language may present considerable scope for interpretation with respect to applications not at issue in this case. Indeed, the Service has adopted regulations to assist with such applications (see pages 9-10, *infra*). Our point is that petitioner's contention in this case plainly exceeds the limits of interpretation permitted by the controlling statutory text.

sheet metal components "have not been advanced in value or improved in condition abroad except by being assembled and except by operations incidental to the assembly process such as cleaning, lubricating and painting." HTSUS subheading 9802.00.80(c). Contrary to petitioner's contention, that provision does not "define[] painting as an operation that is incidental to assembly." Pet. 7. The statutory language instead requires the proponent of the exemption to establish that the goods "have not been advanced in value or improved in condition abroad" other than as result of "assembly" and steps "incidental" to that assembly. As used in that sentence, the ordinary meaning of the term "incidental" is "subordinate, nonessential * * * occurring as a minor concomitant" or "being likely to ensue as a chance or minor consequence." *Webster's Third New International Dictionary* (1986).

Petitioner is wrong to contend (Pet. 9) that the statute's use of the phrase "cleaning, lubricating and painting" can only be understood as prescribing that those processes *always* meet the statutory criterion of being "incidental to the assembly process." Because the reference to those processes is introduced with the phrase "such as," the reference most naturally denotes Congress's intent to cite those processes as examples of matters that can be "incidental." Indeed, "cleaning" and "lubricating" are inherently minor operations, and the use of the term "painting" in conjunction with those processes clearly demonstrates that the legislative mind was directed toward activities of the type listed only insofar as they are minor adjuncts "to the assembly process." There was no intent to have the listed examples become the tail that wagged the proverbial

dog—and to enable manufacturers to secure duty exemptions by "assembl[ing]" goods only as a minor or incidental aspect of complex painting processes that add vastly more value to the goods than the assembly itself.[2]

The same conclusion is suggested by the need to avoid the absurd consequences that would result from petitioner's interpretation of HTSUS. Compare *United States* v. *Brown*, 333 U.S. 18, 27 (1948). Under petitioner's interpretation, the painting of a work of art abroad prior to its assembly into a framed painting, would be considered "incidental to assembly" of the frame and the canvas backing. No argument advanced by petitioner requires such an anomalous doctrine, especially given that petitioner must shoulder a heavy burden of justification in seeking to establish its entitlement to an exemption from duty. "Such

---

[2] Our interpretation does not, as petitioner contends, fail to give effect to every word in the statute. See Pet. 8-9. It instead recognizes that a permissible meaning of the phrase "such as" is "for example," and that the context in which that phrase appears, which the lower courts were bound to consider, see *Reno* v. *Koray*, 115 S. Ct. 2021, 2025 (1995), rules out the possibility that Congress intended any different meaning. Indeed, under petitioner's theory, if a statute provided for the extermination of "all rabid animals such as dogs and raccoons" the statute would require the killing of all dogs and raccoons irrespective of whether they were in fact rabid. Nor is petitioner correct in asserting that, by requiring that painting processes be "minor," the court of appeals created a "highly subjective" requirement out of whole cloth (Pet. 9), or that it has opened the door to "additional and possibly unknown conditions" (Pet. 10). As we have explained, the court's view is fully supported by the ordinary meaning of the word "incidental," which is the central criterion in the pertinent statutory language.

a claim is within the general principle that exemptions must be strictly construed, and that doubt must be resolved against the one asserting the exemption." *United States* v. *Allen*, 163 U.S. 499, 504 (1896); see also *Swan & Finch Co.* v. *United States*, 190 U.S. 143, 146 (1903).

2. Because the language of HTSUS, read in context, answers the question presented by this case, there is no need to consult the legislative history for further guidance. In any event, the legislative history supports the interpretation of the statute adopted by the court below.

Citing the Senate Committee Report that accompanied the 1965 amendments to the statute, petitioner argues that Congress included the reference to painting to "enlarge" the scope of the statutory duty exemption. See Pet. 9 (citing S. Rep. No. 530, 89th Cong., 1st Sess. 34 (1965)). An examination of that report, however, discloses that petitioner has misconstrued the import of that remark. Before the 1965 amendment, the statute provided:

> Articles assembled abroad in whole or in part of products of the United States which were exported for such purpose and which have not been advanced in value or improved in condition abroad by *any means other than by the act of assembly*.

See Tariff Classification Study: Proposed Revised Tariff Schedules of the United States 660 (Nov. 15, 1960). Thus, the only articles entitled to duty-free treatment were articles advanced in value or improved in condition solely by the assembly itself; value added by other steps that were the minor concomitants of assembly did not qualify for duty-free treatment. The 1965 amendments broadened the

statute to permit operations incidental to the assembly process, within the guidelines Congress intended for that term, *i.e.*, minor operations that occur during assembly.

That point is made clear by the House Report that accompanied the 1965 legislation:

> It appears that under the [then current statutory] language * * * *minor operations* such as painting *incidental to assembly abroad* may be precluded, and that in certain respects the [statute] is ambiguous, with the result that it imposes undue administrative burdens on customs officers.
>
> * * * * *
>
> The amended [statute] would specifically permit the U.S. component to be advanced or improved "by operations incidental to the assembly process such as cleaning, lubricating, and painting." It is common practice in assembling mechanical components to perform certain incidental operations which cannot always be provided for in advance. For example, in fitting the parts of a machine together, it may be necessary to remove rust; to remove grease, paint, or other preservative coatings; to file off or otherwise remove small amounts of excess material; to add lubricants; or to paint or apply other preservative coatings. It may also be necessary to test and adjust the components. Such operations, *if of a minor nature incidental to the assembly process*, whether done before, during, or after assembly, would be permitted even though they result in an advance

> in value of the U.S. components in the article assembled abroad.

H.R. Rep. No. 342, 89th Cong., 1st Sess. 48-49 (1965). That passage clearly confirms what the statutory language itself makes clear: that Congress intended the exemption to encompass the minor incidents of assembly, including painting, that did not themselves amount to assembly. It did not intend to allow duty-free treatment for economic value that is predominantly created by complex processes that are not themselves "assembly" or mere incidents of "assembly."

3. There is no greater merit to petitioner's argument (Pet. 13-14) that the court of appeals' interpretation conflicts with the regulations that the Service has promulgated to implement HTSUS. The courts below correctly recognized that a regulation must be consistent with the statute it implements. Any judicial interpretation of a regulation must therefore accord with the limitations reflected in the organic statute. Compare *Arkansas* v. *Oklahoma*, 503 U.S. 91, 105-108 (1992); *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 213-214 (1976). For that reason, petitioner is wrong to fault the courts below for interpreting the Service's regulations in light of the correct construction of the statute that the court of appeals had adopted in *General Motors*.

In any event, the Service's regulations demonstrate that petitioner is wrong to contend that the "plain meaning" (Pet. 13) of those regulations supports petitioner's case. The regulation on which petitioner relies, 19 C.F.R. 10.16(b)(3), makes clear that the "application of * * * paint" is offered merely as an "example[] of operations which are incidental to the

assembly process," and does not support petitioner's contention that *all* painting therefore qualifies as "incidental." Moreover, as the court of appeals noted (Pet. App. 5), a different subsection of the same regulation (not cited in the petition) categorically excludes from duty-free treatment "[a]ny significant process, operation, or treatment * * * whose primary purpose is the * * * physical or chemical improvement of a component" and "[p]ainting primarily intended to enhance the appearance of an article or to impart distinctive features or characteristics." 19 C.F.R. 10.16(c). Those provisions clearly exclude significant preservative painting from the scope of the term "incidental to the assembly process." No argument advanced by petitioner casts doubt on the court of appeals' reasoning on that point.[3]

4. In the thirty years that subheading 9802 and its predecessor have been in effect, the courts have considered the painting issue presented by this case in only two cases—this case and *General Motors*. Moreover, the duty-free treatment for Mexican operations, such as petitioner's, will be affected prospectively by the enactment of legislation implementing the North American Free Trade Agreement (NAFTA), 19 U.S.C. 3301-3473. Under 19 U.S.C. 3332(c) and the HTSUS, if the NAFTA content requirements are met, passenger vehicles may be

---

[3] While the regulations clearly foreclose petitioner's argument, we note that under settled principles of administrative law any ambiguity in those regulations must be resolved in favor of the Service's "plausible construction" (*Ehlert* v. *United States*, 402 U.S. 99, 105 (1971)) even if that construction is not "the best or most natural one by grammatical or other standards." *Pauley* v. *Bethenergy Mines, Inc.*, 501 U.S. 680, 702 (1991).

brought into the United States duty free. Accordingly, the issue presented by petitioner's Mexican operations may lack any continuing practical significance.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WALTER DELLINGER
Acting Solicitor General
FRANK W. HUNGER
Assistant Attorney General
DAVID M. COHEN
JOSEPH I. LIEBMAN
SAUL DAVIS
Attorneys

AUGUST 1996

Supreme Court, U.S.
FILED
AUG 30 1996
CLERK

No. 95-2058

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

CHRYSLER CORPORATION,

Petitioner,

v.

THE UNITED STATES,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

ROBERT E. BURKE
(Counsel of Record)
DONALD J. UNGER
LAWRENCE M. FRIEDMAN
BARNES, RICHARDSON & COLBURN
200 East Randolph Drive
Suite 7920
Chicago, Illinois 60601
(312) 565-2000
Attorneys for Petitioner

Midwest Law Printing Co., Chicago 60610, (312) 321-0220

TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES	ii
I. INTRODUCTION	1
II. THE QUESTION PRESENTED IS SIGNIFICANT AND APPLICABLE IN MANY INDUSTRIES	2
III. THE GOVERNMENT'S STATUTORY ANALYSIS IS INCORRECT	3
IV. THERE IS NO NEED TO RESORT TO LEGISLATIVE HISTORY	6
V. THE DECISION BELOW IMPROPERLY IGNORES A BINDING REGULATION AND THE TRIAL COURT'S FINDING OF FACT	7
CONCLUSION	9

TABLE OF AUTHORITIES

CASES: PAGE

Brown v. Gardner, 115 S.Ct. 552 (1994) 6

C. Itoh & Co., Am. v. United States, 678 F.2d 218 (1982) 9

Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) 7, 8

Chrysler Corporation v. United States, 19 CIT ____, Slip Op. 95-39 (Ct. Int'l Trade Mar. 13, 1995) 9

Chrysler Corporation v. United States, Appeal No. 95-1366 (Fed. Cir. Mar. 22, 1996) 9

Fort Stewart School v. Federal Labor Relations Auth., 495 U.S. 641 (1990) 9

General Motors, 976 F.2d 716 (Fed. Cir. 1992) ... 1

Haggar, Inc. v. United States, 20 CIT ____, Slip Op. 96-110 (Jul. 12, 1996) 3

Jarecki v. Searle & Co., 367 U.S. 303 (1961) .. 4

Norfolk & W. Ry. Co. v. American Train Dispatchers' Assoc., 499 U.S. 117 (1991) 3

STATUTES:

19 U.S.C. § 1202, Harmonized Tariff Schedule of the United States, USITC Pub. 2232, items 9906.87.01-.04 2

19 U.S.C. § 1202, Harmonized Tariff Schedule of the United States, USITC Pub. 2232, item 9802.00.80 5

REGULATIONS:

19 C.F.R. § 10.16 ..... 7, 8, 9

OTHER:

Brief for the United States in Opposition 2, 3, 4, 6

Brief of Amicus Curiae of American Apparel Manufacturers Association, American Association of Exporters and Importers, American Steel Institute, and United States Association of Importers of Textile and Apparel in Support of Petitioner 6

I. INTRODUCTION

Businesses engaged in international trade must be able to rely on the clear language of the trade law and relevant regulations. The enactment of a statute with ambiguous language or the enforcement of trade regulations with unforeseen administratively or judicially imposed pre-conditions is disruptive to the business certainty that is necessary in trade among nations. For that reason, the United State has fostered "transparency" in trade laws and administration in its approach to multilateral trade since the Second World War. Chrysler submits that the position of the United States Customs Service in this case, as adopted by the Court of Appeals for the Federal Circuit and manifest in the government's brief in opposition to the petition before the Court, is totally contrary to the very precepts of openness and predictability that the United State has heretofore fostered. The position of Customs in this case tosses aside clear statutory language and seeks to insert unforeseen conditions to the trade law at issue.

Moreover, as pointed out in our brief in chief and as supported by the *amicus* parties, HTSUS item 9802.00.80 was intended by Congress to be expansive to trade. Until the Federal Circuit decided *General Motors*, 976 F.2d 716 (Fed. Cir. 1992), the courts had regularly struck down efforts by Customs to restrict the use of the law. Instead, the courts interpreted the statute to promote the manufacture and use of United States-made components exported for foreign assembly. The government's position in this case is contrary to the congressional policy of expanding United States production of components used in assembly abroad and is oblivious to the adverse economic effects of its position.

II. THE QUESTION PRESENTED IS SIGNIFICANT AND APPLICABLE IN MANY INDUSTRIES

Remarkably, counsel for the government has argued that the Supreme Court need not decide this case on a writ of *certiorari* because the North American Free-Trade Agreement renders motor vehicles imported from Mexico duty-free upon importation. According to the United States, the issue, therefore, lacks continuing significance. Brief in Opposition at 4, 12.

In reality, not all vehicles imported from Mexico (or Canada) are entitled to duty-free entry under the NAFTA. Presently, trucks imported from Mexico that qualify for preferential duty rates under the NAFTA are subject to a duty ranging from 3.4% to 17.5% *ad valorem*. 19 U.S.C. § 1202, Harmonized Tariff Schedule of the United States, USITC Pub. 2232, items 9906.87.01-.04 ["HTSUS"]. For the government to present NAFTA-related duty reductions as a cornerstone of its position underscores the weakness of its contentions.

In addition, this case raises questions affecting motor vehicles manufactured outside North America. HTSUS item 9802 applies to imports whatever the country of final assembly. The participation of the Association of International Automobile Manufacturers as *amicus curiae* is evidence of the global importance of this question.

Finally, the government ignores the significant impact this question has on other industries. Tariff item 9802 is not restricted to automobile imports; it can apply to any product assembled abroad with United States-origin components. This fact explains the presence of the American Apparel Manufacturers Association, the United States Association of Importers of Textiles and Apparel, the

American Iron and Steel Institute and the American Association of Exporters and Importers as *amici curiae*. None of these associations are directly in the motor vehicle industry and all represent importers with interests throughout the world.

The interests of the textile industry are very much in issue. The Court of International Trade recently decided *Haggar, Inc. v. United States*, 20 CIT ___, Slip Op. 96-110 (Jul. 12, 1996) (Court No. 93-06-00343). That case shows the failed attempt by the Customs Service to apply the unclear doctrine of *General Motors* to non-automotive industries. The period in which to appeal that decision has not yet elapsed but we expect that the United States will appeal thus increasing the need for a decisive opinion from the Supreme Court on the proper analysis of 9802.00.80.

III. THE GOVERNMENT'S STATUTORY ANALYSIS IS INCORRECT

The United States begins its statutory analysis with the concession that "cleaning" and "lubricating" are "inherently minor operations. . . ." Brief in Opposition at 5. "Painting" appears in the statute in exactly the same context as cleaning and lubricating. Customs and the courts, therefore, should interpret these words in the same manner. Thus, Congress must also have considered "painting" an inherently minor operation. The hoary principle *noscitur a sociis* dictates this conclusion.[1]

---

[1] This principle is closely related to *ejusdem generis* which teaches that a list of specific examples controls the scope of the general terms in a statute. *Norfolk & W. Ry. Co. v. American Train Dispatchers' Assoc.*, 499 U.S. 117, 129 (1991). The

(continued...)

Jarecki v. Searle & Co., 367 U.S. 303, 307 (1961) (the meaning of a word can be discerned from the accompanying words).

The word-game hypotheticals the United States proffers to counter Chrysler's statutory analysis are inapposite. First, the hypothetical statute requiring the extermination of "all rabid animals such as dogs and raccoons" does not mean, as the United States asserts, that only rabid dogs and raccoons are subject to extermination. Such a statute, if enacted, would require the extermination of all dogs and raccoons based upon the incorrect premise that dogs and raccoons are necessarily rabid. The only reason the government's example appears to mean something other than what it says is that the reader knows that not all dogs and raccoons are rabid and, therefore, can discern the intended meaning. The United States, armed with a preconceived notion as to the meaning of the word "painting" in 9802, is similarly seeing a meaning that does not appear in the statute.

Another reason the government's hypothetical statute does not advance its interpretation is that it is a hypothetical rather than an example drawn from the HTSUS. Chrysler is unaware of any use of the phrase "such as" in the HTSUS where the examples that follow are not specific examples of articles or processes defined as fitting within the general term preceding "such as." Because the statute must be read *in pari materia*, the fact that an alternative interpretation may exist for a hypo-

---

[1] (...continued)
use of "cleaning, lubricating and painting" as examples of acceptable incidental operations, therefore, are the dog wagging the broad statutory tail of other "operations incidental to assembly." *See* Brief in Opposition at 5-6

thetical statute has no bearing on the meaning of the phrase in this statute. The tariff schedule should be given its clearest meaning. To do so renders it reliable by concerned businesses and our trading partners.

The second hypothetical the United States puts forward is the absurd circumstance of an importer sending canvas abroad where an artist will paint a picture and "incidentally" assembly it into a frame. Chrysler's statutory interpretation would not permit an importer to enter the artwork with the benefit of 9802 because another provision of the statute prevents it. Subpart (b) limits the duty exemption to United States-origin components that "have not lost their physical identity in such articles by change in form, shape or otherwise. . . ." HTSUS item 9802.00.80. The canvas under a Da Vinci is no longer a mere piece of canvas but has merged into the artwork and has lost its physical identity as a canvas. This is distinct from a truck hood or other vehicle part that, even after painting, does not lose its physical identity. The statute, therefore, specifically avoids the very absurdity the United States has raised.

In its brief in opposition, the United States failed to address Chrysler's contention that Customs' current statutory analysis leads to absurd results and a statute that is impossible to administer fairly. The quantitative comparisons the Federal Circuit required in *General Motors* conflict significantly with all of the prior case law concerning "operations incidental to assembly" under 9802 and its predecessor. The new test, based on cost comparisons that are not logically related to finding whether a non-assembly operation is "incidental to assembly" will produce unpredictable results and cause a substantial increase in the costs associated with administering this duty preference.

Despite its attempt to portray Chrysler's statutory analysis as extreme and without support, the United States has not shown that *General Motors* and *Chrysler* are correct interpretations of the statute. To the contrary, Chrysler has consistently shown its interpretation to be more in keeping with this Court's precedents and prior decisions of the Court of Appeals for the Federal Circuit. Those decisions, when construing the scope of 9802, have been inclusive rather than, as Customs would urge, restrictive. As such, we respectfully submit that the Supreme Court should grant this petition for a writ of *certiorari* to review the Federal Circuit's decision.

IV. THERE IS NO NEED TO RESORT TO LEGISLATIVE HISTORY

The United States correctly asserts that "[b]ecause the language of HTSUS, read in context, answers the question presented by this case, there is no need to consult the legislative history for further guidance." Brief in Opposition at 7. The fact that Chrysler and the government have arrived at conflicting views of the statute does not mean that the statute is necessarily ambiguous. Ambiguity arises out of the language and context rather than the mere assertion of conflicting meaning. *Brown v. Gardner*, 115 S.Ct. 552, 555 (1994). Therefore, without convincing proof that Chrysler's affirmative arguments based on many rules of construction are wrong, the Court should forgo an analysis of legislative history.

Should the Court wish to delve more deeply into congressional intent, Chrysler states only that it agrees with the arguments presented by *amici curiae* American Apparel Manufacturers Association, et al. at pages 5 through 8 of their brief. In deference to the Court, Chrysler will not repeat those arguments here. Because

the decision below conflicts with the plain language of the statute and Supreme Court precedent on statutory interpretation, Chrysler respectfully requests that the Supreme Court accept this case for review.

V. THE DECISION BELOW IMPROPERLY IGNORES A BINDING REGULATION AND THE TRIAL COURT'S FINDING OF FACT

The government fails to explain how the limitation on significant processes in 19 C.F.R. § 10.16(c) migrated into the more specific subsection (b) which specifically permits preservative painting. The fact that the reference to preservative painting appears in the first section without limitation suggests that Customs, which drafted the language, intended that subsection (b) be unconditional. Customs intended that businesses engaged in trade, such as Chrysler, be able to rely on this regulation. The Customs Service and the courts should not add new conditions into the regulation on an *ad hoc* basis.

Moreover, the fact that a regulation must be read in conformity with judicial interpretations of the statute does not mean that the agency need not abide by the regulation. Upon finding that the statute limits the scope of acceptable painting operations,[2] the Federal Circuit should then have decided whether the existing regulation properly interprets that limitation. *See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S.

---

[2] In raising arguments regarding the regulations, Chrysler does not mean to imply that the statute is actually ambiguous with regard to painting. Rather, these arguments are presented on the assumption that the Court may find the statute to be ambiguous. In that case, Customs properly promulgated 19 C.F.R. § 10.16 to administratively define incidental painting.

837, 844-45 (1984). In *General Motors*, however, the Federal Circuit ignored the regulation and, therefore, usurped the role of the agency administering the HTSUS. *Id.* at 844 ("a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency") (footnote omitted).

Chrysler submits that 19 C.F.R. § 10.16 reflects Customs' decision to permit preservative painting in the context of 9802.00.80 and, further, that the regulation is a permissible construction of the statute if "incidental" is found to limit the meaning of "painting." The apparent rationale for the regulation is that preserving the assembled article is closely related to the assembly process; it may even be necessary to make the foreign assembly process worthwhile. The physical or chemical improvement of a component, which the regulation excludes in subsection (c)(3), is more similar to non-assembly fabrication or completion of the component. Thus, operations of that nature are not "incidental" to assembly in the sense that those operations are not closely related to the assembly process. Similarly, painting that is primarily intended to enhance the appearance of an article or to impart distinctive features or characteristics is not closely related to assembly. It is more similar to improving the finished article. Those operations, therefore, are not incidental to assembly.

Customs made a rational policy decision to interpret a statute it viewed as ambiguous. Customs then subjected that decision to notice and public comment and published it as a binding regulation. Accordingly, the Customs Service is now bound to adhere to that regulation and should not be permitted to fabricate arguments to cir-

cumvent it. *Fort Stewart School v. Federal Labor Relations Auth.*, 495 U.S. 641, 654 (1990).

In rejecting the application of 19 C.F.R. § 10.16(b), the Federal Circuit also improperly rejected a finding of fact the trial court made after a trial *de novo*. The trial court judge, after hearing expert testimony and personally viewing the production facilities in Mexico, found that Chrysler's application of paint was 70% directed toward preserving the assembled vehicle. *Chrysler Corporation v. United States*, 19 CIT. ___, Slip Op. 95-39, 5 (Ct. Int'l Trade Mar. 13, 1995) (Petition App. at 11). The United States did not challenge this finding on appeal and it should have been binding on the appellate court unless "clearly erroneous." *C. Itoh & Co., Am. v. United States*, 678 F.2d 218, 220 (1982). Nevertheless, the Federal Circuit rejected this finding. *Chrysler Corporation v. United States*, Appeal No. 95-1366, 6 (Petition App. at 5-6) ("Chrysler has not persuaded us that its painting operations were not significant or that they were not intended to enhance the appearance of or to impart distinctive characteristics to the sheet metal parts.").

The Federal Circuit has usurped the position of the agency by nullifying a regulation that is in conformity with its interpretation of the statute. It has also erred by overruling a finding of fact that was not clearly erroneous. As a result, further review by this Court is necessary to correct these serious departures from precedent.

CONCLUSION

The question presented is of continuing importance to importers of goods assembled abroad using United States-origin components and to the United States-based manufacturers of those components. In addition, the

question is of concern to a wide range of industries beyond motor vehicle manufacturing including textile, home appliances, construction equipment, electronics and others.

Furthermore, the United States has not presented convincing arguments that the plain meaning of tariff item 9802 limits incidental painting operations to those that are "minor" in light of the comparisons set out in *General Motors*. Based upon the statutory analysis set forth here and in its petition, Chrysler submits this case presents an important question that the Court should review. Concerning the regulation, the Federal Circuit improperly permitted the Customs Service to ignore its otherwise binding regulation and rejected an undisputed finding of fact by the trial court. These aspects of this case also present substantial and important questions worthy of review by this Court.

Based on all of the forgoing, Chrysler submits that the Supreme Court should grant its petition for certiorari.

Respectfully submitted,

ROBERT E. BURKE
(Counsel of Record)
DONALD J. UNGER
LAWRENCE M. FRIEDMAN
BARNES, RICHARDSON & COLBURN
200 East Randolph Drive
Suite 7920
Chicago, Illinois 60601
(312) 565-2000
Attorneys for Petitioner

Dated: August 29, 1996